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WHY THE SUPREME COURT LIED IN *PLESSY*

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I. INTRODUCTION

*PLESSY v. Ferguson*¹ is high on the list of the most reviled decisions of the Supreme Court, mentioned in the same breath as *Dred Scott v. Sandford*.² It has a number of unfortunate statements³ and the decision

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1. 163 U.S. 537 (1896).

2. 60 U.S. 393 (1856); see, e.g., Geri Yonover, Note and Comment: *Dead-End Street: Discrimination, The Thirteenth Amendment, and Section 1982*, 58 CHI.-KENT. L. REV. 873, 880 n.47 (1982) (citing Laughlin McDonald, *Has the Supreme Court Abandoned the Constitution?*, SATURDAY REV., May 28, 1977 at 10); see also Frank W. Dunham, Jr., *Where Moussaoui Meets Hamdi*, 183 MIL. L. REV. 151, 160-61 (2005); Rev. Theodore M. Hesburgh, C.S.C., *Symposium on Civil Rights and Civil Liberties: The End of Apartheid in America*, 54 GEO. WASH. L. REV. 244, 245 (1986); W. Sherman Rogers, *The Black Quest for Economic Liberty: Legal, Historical, and Related Considerations*, 48 HOW. L.J. 1, 55 (2004).

3. See, e.g., *Plessy*, 163 U.S. at 551 (explaining that statute in question was not "unreasonable" or "more obnoxious to the fourteenth amendment" than federal laws segregating students in District of Columbia). The Court concluded:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

Id. Further, the Court explained, "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation."

served to support more than half a century of "Jim Crow" legislation.⁴ *Plessy's* holding and subsequent history has been discussed by legions of scholars.⁵ This Article addresses a much more limited point—its string citation of a dozen cases.

Justice Henry Billings Brown's opinion for the Court in *Plessy* said that these twelve cases held that statutes for racial separation on public conveyances were constitutional.⁶ For that statement to be true, each case would have to involve a statute, the statute would have to require racial segregation, and a party would have to challenge the constitutionality of the statute. His statement was demonstrably false because none of the cases involved a challenge to a statute requiring segregation. Most of the cases did not even involve the government except insofar as a court decided the case. Only four cases involved a statute, and most of those statutes prohibited discrimination. Only one case involved a statute that even arguably required segregation, and the constitutionality of that statute was not an issue in the case. All twelve cases cited by Justice Brown concerned segregation decisions made by private businesses to whom the Fourteenth Amendment of the Constitution did not directly apply. As discussed below, the cases were misrepresented, transmuted and transplanted by Brown's opinion in constitutional soil that was almost completely foreign to their origins.

Not only was Justice Brown wrong, but the citation error does not appear inadvertent. He should have been aware that cases discussed in the briefs and opinions below did not involve statutes like the one in *Plessy*. More significantly, he found most of the cases outside the record. This suggests that Justice Brown knew these cases and what they held.

Part II of this Article places the string citation in the context of the opinion.⁷ Part III examines each of the cases cited to show how they were improperly described by the string citation.⁸ Part IV discusses evidence that Justice Brown knew he was misstating the holdings of the cases in the string citation.⁹ Part V explains reasons why the Court may have used the

Id. Finally, the Court concluded, "[W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable." *Id.* at 550-51.

4. For a discussion of "Jim Crow" legislation, see Rogers, *supra* note 2, at 55.

5. See, e.g., Hesburgh, *supra* note 2, at 245 (criticizing *Plessy*).

6. See *Plessy*, 163 U.S. at 548 (providing string citation of cases purporting to hold statutes for racial separation on public conveyances constitutional).

7. For a discussion on the string citation in the context of the opinion, see *infra* notes 21-33 and accompanying text.

8. For a discussion of how the cases were improperly described, see *infra* notes 34-132 and accompanying text.

9. For a discussion of Justice Brown's knowledge of the holdings, see *infra* notes 133-171 and accompanying text.

cases in this way.¹⁰ Part VI suggests that this story contains potential lessons for other cases involving issues of equality today.¹¹

The string citation cases illustrate the development of the idea of separate but equal in common carrier law.¹² Courts found carriers had a common law obligation to furnish passengers with substantially equal seating, but they permitted the carrier to decide which seat a passenger would get, even if the decision was based on race. Courts applied that understanding of equality to interpret statutes that required passengers be treated "equally" and without discrimination.¹³ Although the common law, Congress, or a state legislature could impose requirements on carriers short of those the Equal Protection Clause demanded of state actors, the Supreme Court in *Plessy* asserted that these decisions applying the common law principle were constitutional holdings.

The *Plessy* opinion used the string citation to claim that the Court was following precedent—that it was only doing what "the law" required. Instead of examining the original intent of the framers of the Fourteenth Amendment, the Court treated the Amendment's interpretation as a settled matter. Thus, the Court avoided having to explain why the principles applied to restrict private behavior should be used to determine the constitutional limits on government.

There is no reason to doubt that Justice Brown honestly believed that the principles of the common law obligation and the Fourteenth Amendment were the same. They focused on the same term—"equal." The requirement of equality in the common law was influenced by the adoption of the Fourteenth Amendment, the common carrier's obligations reflected its extraordinary public nature and the consequences of a different interpretation would have upset deeply embedded understandings. Although Justice Brown knew that the carrier cases were not statutory, he probably regarded the distinction in this context as insignificant. Making that distinction, however, would have diminished the effect of the string citation without disturbing the result of the case.

There was a strong argument that the Fourteenth Amendment required identity in rights regardless of color. The framers of the Fourteenth Amendment agreed that the Amendment embedded the Civil

10. For a discussion of why the Court may have used the cases in this way, see *infra* notes 172-244 and accompanying text.

11. For suggestions of how this story contains potential lessons for other cases involving issues of equality today, see *infra* notes 245-48 and accompanying text.

12. For a discussion of the development of the common law obligation of common carriers, see *infra* notes 34-40 and accompanying text.

13. For a discussion of the courts' application of "equality" as drawn from common carrier law to interpret statutes, see *infra* notes 124-32 and accompanying text.

Rights Act of 1866¹⁴ as a constitutional principle.¹⁵ Unlike the common law obligation of "substantial equality," the Civil Rights Act of 1866 required all citizens be given the "same" rights as white citizens.

The Fourteenth Amendment's framers probably expected the Privileges and Immunities Clause would be the source for the requirement of sameness. The Fourteenth Amendment prevents states from abridging the privileges and immunities of citizens of the United States, treating all citizens of the United States as having the same privileges and immunities; however, the *Slaughterhouse Cases*¹⁶ interpreted the Privileges and Immunities Clause to apply only to rights arising out of the federal government.¹⁷ Thus, it did not apply to most areas of state law. For this reason, litigants and the Court turned to the Equal Protection Clause¹⁸ to afford African-Americans the protection the Fourteenth Amendment was designed for—and language of equality was the language of the common carrier cases.

The common carrier requirement of equality was itself influenced by the Fourteenth Amendment. Common carrier cases required the carrier to act reasonably in providing accommodations. After the Fourteenth Amendment, courts held that it was unreasonable to deny substantially equal facilities to customers willing to pay the fare. The use of the Fourteenth Amendment to construe the carrier's obligation suggested that the equality required of carriers satisfied the Fourteenth Amendment's command.

The public nature of the carrier also helped make the common law principle appear equivalent to the constitutional command.¹⁹ The obliga-

14. See 1866 Civil Rights Act, Ch. 31, 14 Stat. 27-30, (1866) (codified as amended at 42 U.S.C. §§ 1981-1982 (1987)).

15. See DAVID S. BOGEN, PRIVILEGES & IMMUNITIES 49-53 (2003) [hereinafter PRIVILEGES & IMMUNITIES]; see also CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (Stevens) (calling for constitutional amendment because it is harder to repeal than pass civil rights bill); CONG. GLOBE, 39th Cong., 1st Sess. 2498 (1866) (Broomall). Broomall stated:

It may be asked, why should we put a provision in the Constitution which is already contained in an act of Congress? The Gentleman from Ohio [Mr. Bingham] . . . says the act is unconstitutional. . . . I differ from him upon the law, yet it is not with that certainty of being right that would justify me in refusing to place the power to enact the law unmistakably in the Constitution. On so vital a point I wish to make assurance doubly sure.

Id.; see also CONG. GLOBE, 39th Cong., 1st Sess. 2513 (1866) (Raymond) (concluding that Congress lacked power to enact civil rights bill unless Congress amended Constitution).

16. 83 U.S. 36 (1873) (holding that privileges and immunities were rights derived from federal citizenship and did not include fundamental rights of citizens that were those of state citizenship).

17. See *id.* at 74-75.

18. See U.S. CONST. amend. XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.").

19. For a discussion of Justice Brown's equating the common law principle with the constitutional command, see *infra* notes 190-236 and accompanying text.

tion itself demonstrated the unique legal status of the carrier. Carrier regulations were subject to the common law, but the common law was subject to statute. Segregation statutes had been considered constitutional by legislators and treatise writers, and the Supreme Court had not invalidated them before *Plessy*. But the statutes altered the common law. Because statutory compliance offered a defense to an action against a carrier, the common law requirement of equality seemed more stringent. From this perspective, constitutional doctrine could not be expected to go any further.

Finally, if the Court had interpreted the Equal Protection Clause to require all persons be afforded identical rights without regard to race, it would have undermined its position on miscegenation. The common carrier context demonstrated that rights were not the same when defined in racial terms; a right to ride with one's race did not insure the races had equivalent seating. If rights are not racially defined, however, anti-miscegenation laws are incompatible with a command that all persons have the same rights. That helped drive the Court to conclude that equality required only substantial equivalence. The separate if equal principle of the common law appeared to be the easiest way for the Court to retain continuity with its miscegenation decisions.

The *Plessy* Court's deceptive string citation suggests that the importance of classification to the Fourteenth Amendment may be overlooked, that courts need to focus on the relation of government to the individual and to heed the distinction between customary behavior and constitutional commands. These concerns have particular relevance to contemporary issues of gay marriage. We should question our assumptions carefully before affirming laws that isolate any sector of our community.

II. THE SUPREME COURT'S STRING CITATION OF TRANSPORTATION CASES IN *PLESSY*

Homer A. Plessy was arrested for violating a Louisiana law requiring segregation on railroads. He pled that the law was unconstitutional and the state demurred. The trial judge, John H. Ferguson, ruled that there was no unfair discrimination because both white and black passengers would be punished for going into the car where they do not belong.²⁰ Judge Ferguson dismissed the plea and ordered Plessy to plead over. Plessy's lawyers then sued to prohibit the judge from proceeding with trial. Thus the title of the case was *Plessy v. Ferguson*, although the real party in interest was Louisiana. The Louisiana Supreme Court supported Ferguson and Plessy filed a writ of error.

20. See Transcript of Record, The State of Louisiana v. Homer Adolph Plessy (Criminal District Court No. 19117) certified to Supreme Court of Louisiana in Ex Parte Homer A. Plessy No. 11134, filed Nov. 26, 1892, Judgment of the district court.

Justice Brown devoted most of his opinion for the United States Supreme Court to arguments based on the Fourteenth Amendment.²¹ He recognized that the object of the Fourteenth Amendment was to establish "absolute equality of the two races before the law,"²² but he distinguished between social and political equality. He argued that school segregation and anti-miscegenation laws received broad acceptance as instances of social separation in contrast to the denial of political rights exemplified by the exclusion of African-Americans from juries, which the Supreme Court had held invalid.²³

Having established to his own satisfaction that racial separation was constitutional with respect to civil as opposed to political rights, Justice Brown turned to the question whether the state had the power to regulate railroad seating in this case. He said that railroad charters or local laws could prohibit the use of race in assigning seats on railroads,²⁴ but he pointed out that the Court invalidated a Louisiana anti-discrimination law that applied to interstate commerce in *Hall v. DeCuir*.²⁵ Although Justice Brown did not mention it, *Hall* assumed that if state anti-discrimination laws could validly apply to interstate commerce, state segregation laws could apply as well.²⁶ Justice Brown did note that the Court held a federal public accommodations law invalid for supplanting state power over local matters.²⁷ He reasoned that states had power to regulate railroad seating in local commerce, and that racial separation could be required because it was an issue of social rather than political equality.

Justice Brown then discussed *Louisville, N.O. & T. Ry. Co. v. Mississippi*,²⁸ which involved a Mississippi statute that required railroads to provide separate accommodations for the white and colored races.²⁹ The United States Supreme Court had held that the statute did not violate the commerce clause because it was confined to accommodations for passen-

21. See *Plessy v. Ferguson*, 163 U.S. 527, 542-43 (1896) (dismissing arguments summarily based on Thirteenth Amendment).

22. *Id.* at 544.

23. See *id.* at 544-45.

24. See *id.* at 546 (citing *Railroad Company v. Brown*, 84 U.S. 445 (1873)).

25. See *id.* at 546 (citing *Hall v. De Cuir*, 95 U.S. 485 (1878)).

26. See *Hall*, 95 U.S. at 489 ("No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate.").

27. See *Plessy*, 163 U.S. at 546-47 (citing *United States v. Stanley*, 109 U.S. 3 (1883)).

28. 133 U.S. 587 (1890) (noting carefully that it was deciding only whether separate car had to be provided, not whether state could require anyone to ride in that car). Since the only injury was to the railroad in having to put an extra car on, the sole question addressed by the Court was whether that burden violated the Dormant Commerce Clause. *Id.* at 591-92. But see *id.* at 593 (Harlan, J., dissenting) (explaining that Mississippi statute was regulation of commerce forbidden under *Hall v. De Cuir*).

29. See *id.* at 588.

gers traveling intrastate.³⁰ Justice Brown said the same was true of the Louisiana statute in *Plessy* because the Supreme Court of Louisiana "held that the statute in question did not apply to interstate passengers, but was confined in its application to passengers traveling exclusively within the borders of the State."³¹ The train that Plessy took was "purely a local line."³²

At this point Justice Brown had laid out the basic reasoning in support of the segregation statute. He could have turned then to reply to the specific points raised by counsel. Instead, he moved from reasoning to the assertion of authority. Here, Justice Brown set forth the string citation that is the focus of this article:

Similar statutes for the separation of the two races upon public conveyances were held to be constitutional in *West Chester &c. Railroad v. Miles*, 55 Penn. St. 209; *Day v. Owen*, 5 Michigan, 520; *Chicago &c. Railway v. Williams*, 55 Illinois, 185; *Chesapeake &c. Railroad v. Wells*, 85 Tennessee, 613; *Memphis &c. Railroad v. Benson*, 85 Tennessee, 627; *The Sue*, 22 Fed. Rep. 843; *Logwood v. Memphis &c. Railroad*, 23 Fed. Rep. 318; *McGuinn v. Forbes*, 37 Fed. Rep. 639; *People v. King*, 18 N.E. Rep. 245; *Houck v. South Pac. Railway*, 38 Fed. Rep. 226; *Heard v. Georgia Railroad Co.*, 3 Int. Com. Com'n, 111; S.C., 1 Ibid. 428.³³

This was a simple statement of fact regarding the holdings of twelve cases—asserting that each of them held that statutes like Louisiana's segregation law were constitutional. But the statement is false. Louisiana required trains to segregate and passengers to abide by segregation, but none of the twelve cases cited involved a statutory requirement that passengers sit in segregated areas, and none challenged a law that required segregation.

III. WHAT THE CASES REALLY HELD

Almost all of the cases in *Plessy*'s string citation involved the common law limits on a carrier's power to racially segregate its passengers. The first three cases came from northern states. They established the principle that a common carrier is obliged to carry all passengers but is allowed to separate the races if the separate facilities are substantially equal. The next two cases came from Tennessee, where an ambiguous state statute required railroads to provide additional first class cars or areas for colored passengers as an "anti-discrimination" measure. Arguably, the statute merely codified the common law. The plaintiff in the first Tennessee case sought to enforce the statute against the defendant, not to challenge it. Further,

30. *See id.*

31. *Plessy*, 163 U.S. at 548-49.

32. *See id.* at 548.

33. *Id.*

the statute was inapplicable to the second case, which was based on gender, not race.

The Court then cited four federal cases in order of their appearance in the Federal Reports, interrupted by the citation of a state case. The federal courts applied the separate if equal common law principle, but the cases did not involve a challenge to a federal or state statute. The state case challenged a New York statute that *prohibited* racial discrimination.

Two Interstate Commerce Commission decisions involving the same parties ended the string citation. The Commission interpreted the anti-discrimination provisions of the Interstate Commerce Act in light of the common law principle to require equal accommodations if the races were separated, but the Act did not require the separation.

A. *The Development of the Common Law Obligation of Common Carriers:
From Reasonable to Separate If Equal*

The core principle in the cases in the string citation was an American derivation from the principle developed in the English common law. The English principle arose to cope with problems of the Black Death and was a departure from Roman law. The English courts ruled that common carriers must transport all persons who present themselves in a reasonable manner if there is space. The master could reasonably decide where such passengers would be located. American courts had to deal with this issue in the context of widespread racial discrimination. Initially, they seemed uncertain as to the requirements of reasonableness. After the adoption of the Fourteenth Amendment, however, American courts concluded that carriers must transport all passengers willing to pay for first class passage in substantially equal facilities although the carrier could separate the races when it did so.

1. *The Carrier's Obligation at Common Law*

Innkeepers and carriers were often classed together in the Digest of Justinian.³⁴ Both professions were strictly liable for injury to their customer's property unless they obtained a waiver.³⁵ Thus Roman law indicated a common understanding about innkeepers and carriers, and a

34. See 1-4 THE DIGEST OF JUSTINIAN (Theodor Mommsen & Alan Watson eds., 1985) (codifying Roman law); DIG. 4.9 and DIG. 47.5.1 (Ulpian, Ad Edictum 38) are devoted to actions against innkeepers and ship's masters.

35. See DIG. 4.9.1 (Ulpian, Ad Edictum 14) ("The praetor says: 'I will give an action against seamen, innkeepers, and stablekeepers in respect of what they have received and undertaken to keep safe, unless they restore it.'"); see also DIG. 4.9.1.8.

Moreover does the 'seaman' accept goods and undertake that they will be safe only where the goods on being sent to the ship have been handed over to him, or is he held to have received the goods even if they have not been handed over, because they have been sent to the ship? And I think that he receives for safekeeping all the goods which have been brought onto the ship and that he ought to be liable for the acts not only of the crew but also of the passengers. . . .

concern for protecting the property of the lodger or passenger. The Digest justified the presumptive strict liability by a purported right to reject customers,³⁶ although that was a poor justification, and the right to reject itself may have been only speculation.³⁷

English common law developed somewhat differently, requiring innkeepers to accept all who sought shelter. This obligation initially arose as an incident of the protection of lodgers from theft during the dislocation that followed the Black Death. The duty precluded innkeepers from compelling lodgers to waive their rights as a condition of gaining a room.³⁸ The common carrier obligation to accept all passengers was an extension from the common law obligation of innkeepers.³⁹ It may have developed from a similar fear that carriers would reject passengers in order to coerce a waiver of liability for loss and injury.⁴⁰ As the economy developed, the courts permitted businesses to contract out of their liability, but they did not release the carrier from its obligation to accept passengers. By the nineteenth century, it was a well-established feature of the common law that a carrier must accept all passengers, but how the carrier should treat the passenger was still open for debate.

The first three cases cited by the Court in *Plessy* exemplify a common law progression in state courts in the United States. The first case permitted racial discrimination as a reasonable act of the carrier, but the later decisions insisted upon equality of accommodations if the carrier chose to separate the passengers. The first two cases reflected the belief that racial separation was a good idea, but they arose before the enactment of the Fourteenth Amendment and legislatures in those states repudiated segregation long before *Plessy* was decided. None of these cases faced the issue whether states could constitutionally command separation of the races.

Id.; DIC. 4.9.2 (Gaius, *Ad Edictum Prouinciale*) ("[J]ust as an innkeeper is liable for the acts of travelers."); DIC. 4.9.3 (Ulpian, *Ad Edictum*) ("[Pomponius] says that even if the goods have not yet been received on the ship but have been lost on shore, once the 'seaman' has received them the risk is with him."); DIC. 4.9.3.1 (Ulpian, *Ad Edictum*) ("Hence, Labeo writes that if anything is lost through shipwreck or an attack by pirates, it is not unfair that a defense be given to the 'seaman.' The same must be said if an act of *vis maior* occurs in a stable or inn.").

36. See DIC. 4.9.1 (Ulpian, *Ad Edictum* 14) ("Let no one think that the obligation placed on them is too strict; for it is in their own discretion whether to receive anyone. . . .").

37. See David S. Bogen, *Ignoring History: The Liability of Ship's Masters, Innkeepers and Stablekeepers Under Roman Law*, AM. J. LEGAL HIST. 326, 332-60 (1992) [hereinafter *Ignoring History*].

38. See David S. Bogen, *The Innkeeper's Tale: The Legal Development of a Public Calling*, 1996 UTAH L. REV. 51, 86 (1996) [hereinafter *Innkeeper's Tale*] (addressing innkeeper's "duty to serve the public").

39. See generally *Jackson v. Rogers*, 89 Eng. Rep. 968 (1693) (analogizing common carrier's failure to carry goods to innkeeper's duty to accept guests).

40. See Bogen, *Innkeepers Tale*, *supra* note 38, at 54, 85-86 (noting that "liability was based on status rather than agreement.").

2. *Day v. Owen* (1858)

In *Day v. Owen*,⁴¹ an African-American passenger sued a Michigan steamship company owner prior to the Civil War for refusing to carry him in a cabin on the boat. The Supreme Court of Michigan applied the general common law rule that the defendant could not refuse to carry the plaintiff without a good excuse. The Court, however, said that "the accommodation of passengers, while being transported, is subject to such rules and regulations as the carrier may think proper to make, provided they be reasonable."⁴² In other words, passengers had a right to be carried, but carriers had a right to tell them where to be on the boat.

The Michigan Court held that the carrier could act to promote the "community at large" and, in doing so, could exclude the plaintiff from the cabins as long as it was willing to carry him on deck.⁴³ Thus, the court did not require equality, but permitted the carrier to discriminate to satisfy the desires of the majority of its passengers.⁴⁴

Day was no longer precedent in Michigan when the Court decided *Plessy*. The state had enacted a public accommodations law in 1885 that required equal treatment without regard to color. William Ferguson sued Gies European Restaurant for refusing to serve him on the restaurant side as opposed to the saloon side of the premises. The trial court charged the jury that the law was satisfied by separate facilities that were equal in comfort, citing several common carrier cases including *Day*.⁴⁵ The Supreme Court of Michigan reversed, saying:

In *Day v. Owen*, 5 Mich. 520, this same principle was recognized; but it must be remembered that the decision, . . . was made in the

41. 5 Mich. 520 (1858).

42. See *id.* at 525-26.

43. *Id.* at 528. The Court in *Day* noted:

It states defendant refused to carry the plaintiff in the cabin, and not that he refused to carry him generally, and seems to admit the carrying of passengers in other parts of the boat as well as in the cabin, and therefore does not make out a case of refusal to carry generally.

Id.

44. See *id.* at 527. The court explained:

[The law] does not require a carrier to make any rules whatever, but if he deems it for his interest to do so, looking to an increase of passengers from the superior accommodations he holds out to the public, to deny him the right would be an interference with a carrier's control over his own property in his own way, not necessary to the performance of his duty to the public as a carrier.

Id.

45. See Paul Finkelman, *The Surprising History of Race and Law in Michigan*, MICH. SUPREME COURT HISTORICAL SOC'Y, Apr. 27, 2006, <http://www.micourthistory.org/news-events/FinkelmanVignette.htm> (describing legal history of race relations in nineteenth and early twentieth century Michigan). William Ferguson was a businessman who became Michigan's first African-American legislator. *Id.* His attorney, D. Augustus Straker, had been a legislator in South Carolina and was the first African-American judicial officer in Michigan. *Id.*

*ante bellum days, before the colored man was a citizen, and when, in nearly one-half of the Union, he was but a chattel. It cannot now serve as a precedent.*⁴⁶

3. The West Chester & Philadelphia R.R. Co. v. Miles (1867)

After the Civil War, state courts permitted carriers to separate the races, but they began to insist that carriers afford black passengers first class accommodations. The most prominent case announcing the common law rule was *The West Chester and Philadelphia Railroad Company v. Miles*,⁴⁷ an 1867 Pennsylvania Supreme Court decision.

The plaintiff, Mary Miles, was forced to leave the train because she refused to move from her seat in the middle of the car to go to the rear of the carriage as the railroad rules required for persons of color. The defendants requested the trial judge to charge the jury: "If the jury find that the seat which the plaintiff was directed to take, was in all respects a comfortable, safe and convenient seat, not inferior in any respect to the one she was directed to leave, she cannot recover."⁴⁸ The trial court rejected this request. It charged the jury instead that defendants could not make her change her seat simply because of color, and Ms. Miles won at trial.

The Pennsylvania Supreme Court reversed the judgment, echoing the views of *Day*: "The right of the PASSENGER is only that of being carried safely, and with a due regard to his personal comfort and convenience, which are promoted by a sound and well-regulated separation of PASSENGERS."⁴⁹ The court insisted that, "a guest in an inn cannot select his room or his bed at pleasure; nor can a voyager take possession of a cabin or a berth at will, or refuse to obey the reasonable orders of the captain of a vessel."⁵⁰

Justice Daniel Agnew's opinion for the court said that the carrier must act reasonably, but he found that segregation was reasonable:

When, therefore, we declare a right to maintain separate relations, as far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts.⁵¹

46. *Ferguson v. Gies*, 82 Mich. 358, 363-64 (1890) (emphasis added).

47. 55 Pa. 209 (1867).

48. *Id.* at 209.

49. *Id.* at 212.

50. *Id.*

51. *Id.* at 214. Judge Allan B. Morse said of this passage from Agnew's opinion in *West Chester*: "This reasoning does not commend itself either to the heart or judgment." *Ferguson*, 82 Mich. at 366.

In other words, the common law obligations of carriers required them to take passengers regardless of color, but did not prevent the carrier from separating the races when seating them. Justice Agnew's opinion accepted racial distinctions completely, referring to the "natural law which forbids their intermarriage."⁵²

Although a Philadelphia court in 1861 held that excluding negroes from riding inside passenger cars was reasonable, such discrimination was unacceptable after the Civil War.⁵³ In 1865 another judge of the Philadelphia court found ejection from a streetcar because of race was actionable.⁵⁴ Chief Justice Taney had stated in *Dred Scott* that African-Americans were not citizens of the United States.⁵⁵ But the war resulted in a repudiation of his opinion by both statute and constitutional amendment. Section one of the Civil Rights Act of 1866 provided: "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States. . . ."⁵⁶ The Fourteenth Amendment also began with the acknowledgment of citizenship for all persons born in the United States. Although the Fourteenth Amendment did not apply directly to private entities, it evidenced the postbellum societal understanding that racial discrimination was not "reasonable" behavior.

Thus, the Pennsylvania Supreme Court in *West Chester* spoke of "due regard to equality of rights," and the requested charge referred to a seat "not inferior in any respect to the one she was directed to leave."⁵⁷ This portion of the opinion was part of the basis for generating a rule of "separate but equal" in the common law. Other state courts expressly used the enactment of the Fourteenth Amendment to demonstrate that the status of the negro had changed and that racial discrimination in transportation could no longer be justified.⁵⁸

52. See *West Chester*, 55 Pa. at 213 (discussing grounds for separation of races based on natural law).

53. See *Goines v. M'Candless*, 4 Phila. Reports 255, 257-58 (1861) (concluding regulation was wise and entering judgment for defendant).

54. See *Derry v. Lowry*, 6 Phila. Reports 30, 32 (1865) (finding carriers could not exclude any class of persons based on race). The court explained:

The logic of events of the past four years has in many respects cleared our vision and corrected our judgment; and no proposition has been more clearly wrought out by them than that the men who have been deemed worthy, to become the defenders of the country, to wear the uniforms of the soldier of the United States, should not be denied the rights common to humanity. . . .

Id. at 33.

55. See *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857), (finding that African-Americans not intended to be included as citizens under Constitution), *superseded by Constitutional Amendment*, U.S. CONST. amend. XIII.

56. Civil Rights Act of 1866, ch. 31, §1, 14 Stat. 27, 27-30.

57. *West Chester*, 55 Pa. at 211, 214.

58. See *Ferguson v. Gies*, 82 Mich. 358, 364 (1890) ("The negro is now, by the Constitution of the United States, given full citizenship with the white man, and all the rights and privileges of citizenship attend him wherever he goes."). See generally

Justice Agnew may have thought public transport segregation laws would be appropriate, but he did not have such a statute before him in the case. In discussing the propriety of the carrier's decision, he noted that schools in Pennsylvania were racially separated when there were sufficient students to do so and that military units were also segregated. He cited an 1838 decision of the Pennsylvania Court that held, analogously to *Dred Scott*,⁵⁹ that the status of "negro" was not recognized as a "freeman" under Pennsylvania's Constitution, and therefore negroes were not citizens of the state. Thus, Justice Agnew spoke of the law as sanctioning the differences in the races: "Law and custom having sanctioned a separation of races, it is not the province of the judiciary to legislate it away."⁶⁰ Law and custom, however, did not support separation when he decided the case. An 1867 Pennsylvania statute prohibited railroad companies from making any distinction on account of race or color.⁶¹ Agnew avoided the impact of the statute by arguing that the enactment after Ms. Miles's expulsion demonstrated that the legislature believed the railroad's behavior was lawful when it took place.⁶²

In sum, Justice Agnew's references to pre-Amendment laws unrelated to common carriers did not justify Justice Brown's statement that *West Chester* held statutes requiring transport segregation constitutional. The constitutionality of such a statute was never raised or directly commented upon in the opinion, because no such statute existed in Pennsylvania. Indeed, the only statute in the case pointed in the opposite direction.

4. Chicago & Nw. Ry. Co. v. Williams (1870)

The next major case that the Court cited in *Plessy* made it clear that the common law required equality in seating. Anna Williams sued the Chicago & Northwestern Railway Company claiming that they refused to

David S. Bogen, *Precursors to Rosa Parks: Maryland Transportation Cases Between the Civil War and the Beginning of World War I*, 63 MD. L. REV. 721 (2004) (discussing Judge Giles' use of the Fourteenth Amendment to apply common law rules in Baltimore streetcar cases).

59. See *Dred Scott*, 60 U.S. at 407 (stating that negroes were not citizens under Constitution).

60. *West Chester*, 55 Pa. at 214-15.

61. See *Cent. Ry. Co. of N.J. v. Green*, 86 Pa. 427, 430-32 (1878) (discussing statute prohibiting railroad from refusing to allow passenger to use particular car on grounds of race). But see Benjamin H. Hunt, *Why Segregation in Postwar Philadelphia*, in *THE ORIGINS OF SEGREGATION* 95, 95-96 (Joel Williamson ed., D.C. Heath and Co. 1968) (discussing state of segregated railroad cars and ejection of passengers based on race). See generally Philip S. Foner, *The Battle to End Discrimination Against Negroes on Philadelphia Streetcars* (pts. 1 & 2), 40 PA. HISTORY 237, 261-90 (July 1973), 40 PA. HISTORY 351, 355-79 (Oct. 1973).

62. See *West Chester*, 55 Pa. at 215 (finding Act that arose after *West Chester* was "indication of the legislative understanding of the law as it stood before the passage of the act").

allow her to sit in the ladies car because of her color.⁶³ The Illinois Supreme Court noted that the company had not promulgated any rule other than separation of the genders, and therefore her exclusion was unreasonable. Nevertheless, the court went on to discuss whether a color-based rule would be lawful. It cited *West Chester* as saying that separate seating that was equally safe and comfortable was reasonable. The Illinois Court suggested in dicta that "[u]nder some circumstances, this might not be an unreasonable rule."⁶⁴ The Court then continued, however: "At all events, public carriers, until they do furnish separate seats equal in comfort and safety to those furnished for other travelers, must be held to have no right to discriminate between passengers on account of color, race or nativity, alone."⁶⁵

In short, the three state cases cited by the Court demonstrated that common carriers had at one time segregated passengers in the north and that such segregation did not violate the common law. But two of the cases involved events that preceded passage of the Fourteenth Amendment, and the last case only speculated as to whether separation was permissible. Moreover, since the Fourteenth Amendment only forbids state behavior, it did not directly apply to the right of a private carrier to discriminate, which was the only issue involved in the cases.⁶⁶ Since none of the first three cases cited by the Court in *Plessy* involved a state law requiring separation of the races or held that such a law would be constitutional, the Court's assertion that they did was false.

B. *The Common Law Principle Applied in the Context of an Ambiguous Statute*

The next two cases cited by the Court came from Tennessee, which has been said to have passed the first Jim Crow law.⁶⁷ The common law principle insisted that carriers afford black and white passengers seats equal in comfort and safety, but equality posed economic problems for racial separation. For example, railroads often had only two cars—a non-smoking "ladies car" reserved for ladies and the men who accompanied them, and a second car for all others where smoking was permitted. Railroads often excluded black passengers from the ladies car unless accompanying a white woman in a domestic capacity. Since smoking and nonsmoking cars are not equal, strict segregation could force railroads to

63. See *Chi. & Nw. Ry. Co. v. Williams*, 55 Ill. 185, 186-87 (1870) (discussing facts of case).

64. *Id.* at 189.

65. *Id.*

66. For a discussion of how the Fourteenth Amendment could, however, be used in reasoning about the reasonableness of decisions by private persons, see *supra* note 58 and accompanying text.

67. See Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1388 (1996) (stating that Tennessee passed first Jim Crow law in 1881).

add a third car for African American women, though the traffic did not justify it.

1. *The Tennessee Statute*

To avoid the common law requirements, Tennessee passed a statute in 1875 to eliminate the common carrier's obligation.⁶⁸ The purpose of the statute was to enable common carriers to discriminate, but it was permissive rather than obligatory. It did not preclude actions brought on the basis of breach of contract,⁶⁹ nor did it apply to interstate transport.⁷⁰ Further, Congress enacted the federal Civil Rights Act of 1875, which required "equal enjoyment of the accommodations. . . of inns [and] public conveyances on land or water. . . subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color. . . ."⁷¹ Although some courts interpreted the federal Civil Rights Act of 1875 to permit segregation on common carriers where the seats were equally comfortable, the Act still provided a basis for suit.⁷² Thus, the 1875 Tennessee statute did not prevent litigation, but led plaintiffs to assert their rights in federal court.⁷³

68. See Act of Mar. 23, 1875, ch. 130, 1875 Tenn. Pub. Acts 1 ("[T]he rule of the Common Law giving a right of action to any person excluded from any Hotel or public means of transportation or place of amusement, is hereby abrogated. . . .").

69. See, e.g., Transcript of Case at 6, *Wells v. Chesapeake Ohio and Sw. Ry. Co.*, No. 8130 (Cir. Ct. Shelby County, Tenn. Mar. 31, 1885) (stating Plaintiff's breach of contract cause of action).

70. See *Brown v. Memphis & C.R. Co.*, 5 F. 499, 501 (C.C.W.D. Tenn. 1880) (citing *Hall v. DeCuir*, 95 U.S. 485 (1877)). In *Brown*, Judge Hammond charged the jury that the statute could not deprive the plaintiff of the common law right of action on an interstate journey because that would interfere with congressional power over commerce. *Id.*

71. Civil Rights Act of 1875, ch. 114, §1, 18 Stat. 335, 336 (2003).

72. See *Green v. City of Bridgeton*, 10 F. Cas. 1090, 1093 (S.D. Ga. 1879) (finding colored passengers of steamboat were entitled to separate but equally suitable accommodations as white passengers); *United States v. Dodge*, 25 F. Cas. 882, 883 (W.D. Tex. 1877) (concluding that defendant would not be liable for prosecution when colored passenger was only allowed in one railway car if cars were equally fit); Charge to Grand Jury—Civil Rights Act, 30 F. Cas. 999, 1001 (C.C.W.D.N.C. 1875) (stating that both races are entitled to "convenient and comfortable accommodations in inns and public conveyances"); Stephen J. Riegel, *The Persistent Career of Jim Crow: Lower Federal Courts and the "Separate but Equal" Doctrine, 1865-1896*, 28 AM. J. LEGAL HIST. 17, 32-33 (1984) (discussing federal judges use of "separate but equal" doctrine).

73. Litigants in federal court often sued under the common law of carriers or contracts rather than the Civil Rights Act in order to avoid the damage limitations. See Kenneth W. Mack, *Law, Society, Identity, and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875-1905*, 24 LAW & SOC. INQUIRY 377, 385 (1999) (noting that Civil Rights Act limited damages to \$500, while many blacks sued for thousands of dollars under common law). They may also have avoided the Civil Rights Act because shortly after its enactment a federal judge (Emmons) had charged a grand jury in Tennessee that it was unconstitutional. See Charge to Grand Jury—Civil Rights Act, 30 F. Cas. 1005, 1006 (C.C.W.D. Tenn.

Although an attempted repeal of the state statute failed,⁷⁴ the Tennessee legislature did pass a related penal statute in 1881. The preamble explained the statute's design as an anti-discrimination measure to ensure equality in first class cars.⁷⁵ The preamble stated:

WHEREAS, it is the practice of railroad companies located and operated in the State of Tennessee to charge and collect from colored passengers traveling over their roads first class passage fare, and compel said passengers to occupy second class cars where smoking is allowed, and no restrictions enforced to prevent vulgar or obscene language; therefore. . . .⁷⁶

The 1881 Tennessee statute commanded railroads to furnish "separate cars," but it was ambiguous on whether it compelled segregation:⁷⁷

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That all railroad companies located and operated in this State shall furnish separate cars, or portions of cars cut off by partition walls, in which all colored passengers who pay first class passenger rates of fare, may have the privilege to enter and occupy, and such apartments shall be kept in good repair, and with the same conveniences, and subject to the same rules governing other first class cars, preventing smoking and obscene language.⁷⁸

1875) (concluding that Thirteenth Amendment did not authorize Congress's regulation of private inns and common carriers in Act). Nevertheless, one of the federal litigants was Sally Robinson, whose case was among those consolidated in the Civil Rights Act Cases. See Civil Rights Act Cases, 109 U.S. 3, 4-5 (1883) (discussing Robinson's case). In addition to the deterrence of unsympathetic courts, individuals who tested compliance with the act in Nashville in 1875 were likely to lose their jobs. See HOWARD N. RABINOWITZ, *RACE RELATIONS IN THE URBAN SOUTH, 1865-1890* 196, 391 n.63 (Oxford Univ. Press 1978) (explaining case of twelve blacks who tested compliance to Civil Rights Act and impact of economic retaliation).

74. See Stanley J. Folmsbee, *The Origin of the First "Jim Crow" Law*, 15 J. S. LEGAL HIST. 235, 238 (1949) (citing Tennessee General Assembly, *House Journal*, at 540 (1881)) (stating that Negro legislators did not "secure enough Republican votes to defeat the law").

75. See CATHERINE A. BARNES, *JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT* 209 n.17 (William E. Leuchtenburg ed., Columbia Univ. Press 1983) (discussing intent of 1881 Act as anti-discrimination law). The title of the Act in the Laws of Tennessee was "An Act to prevent discrimination by railroad companies among passengers who are charged and paying first class passage, and fixing penalty for the violation same." Act of April 7, 1881, ch. 156, 1881 Tenn. Pub. Acts 211, 211 (amended 1882).

76. *Id.*

77. See Mack, *supra* note 73, at 384 (explaining that 1881 statute was ambiguous when it required railroads to provide separate cars for first-class black passengers).

78. Act of April 7, 1881, ch. 156, 1881 Tenn. Pub. Acts 211, 211 (amended 1882).

Although colored passengers were to have a first class area where they could go, the statute did not say that whites should have an area from which colored passengers would be excluded. The statute provided that separate areas must exist in which colored passengers *may* have the privilege to enter and occupy, but it did not require colored passengers to ride in such cars or railroads to force them to occupy them. It referred to the smoking car as a "second class" car, and the smoker, regardless of race, might prefer to stay in the "second class" car where he could smoke. The statute stated its purpose to deal with the railroads' practice of compelling colored passengers to occupy second class cars. If the railroad allowed colored passengers to occupy first class cars in which whites were present, it could argue that it satisfied the purpose of the statute. Perhaps the statute merely required railroads to provide first class cars to which colored passengers would have access separate from smoking cars, leaving it to the railroad to determine whether the races would be separated.

The ambiguity of the 1881 statute was exacerbated by an amendment in 1882 that did not mention separate cars but provided:

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee, That all persons who purchase tickets, and pay therefore first-class passenger rates, shall be entitled to enter and occupy first-class passenger cars, and it shall be the duty of all railroad companies located and operated in this State to furnish such passengers, accommodations equal in all respects in comfort and convenience to the first-class cars on the train, and subject to the same rules governing other first-class cars.*⁷⁹

The Amendment repealed much of the 1881 act that conflicted, but the "separate car" requirement of the earlier statute did not necessarily conflict. There were no decisions on the necessity for a separate car, because railroads were not sued when they permitted colored passengers to ride in first class cars with whites. In light of the race-neutral 1882 Amendment, it seems appropriate to read the statute to permit railroads to provide separate first class accommodations for the races, but not to require separation.⁸⁰ The state statute became particularly important when the

79. Act of May 22, 1882, ch. 6, 1882 Tenn. Pub. Acts 12; see also Mack, *supra* note 73, at 384 (discussing 1882 amendment).

80. See Mack, *supra* note 73, at 384 (finding that 1882 amendment did not require segregation on its face). "Separate cars or portions of cars set off by partition walls" strongly suggests racial separation, and "other first class cars" suggests a distinction between the required cars and the existing first class cars that had been restricted to whites only. Compare Act of May 22, 1882, ch. 6, 1882 Tenn. Pub. Acts 12 (implying separate accommodations are not required in railroad cars), with Act of April 7, 1881, ch. 156, 1881 Tenn. Pub. Acts 211, 211-12 (requiring separate accommodations in railroad cars). For a discussion of how Judge Pierce's opinion suggests that racial separation was required by the statute, see *infra* notes 86-87 and accompanying text. Nevertheless, at least one treatise writer believed that the Tennessee statute merely reflected the common law principle, permitting segregation where there were comparable facilities, but not requiring it. See ROBERT HUTCHIN-

United States Supreme Court held the Civil Rights Act unconstitutional in 1883.⁸¹ That left plaintiffs in Tennessee to their recourse under state laws.

2. Chesapeake, Ohio & Sw. R.R. v. Wells (1887)

On September 15, 1883, Ida B. Wells was ejected from the ladies car of the Chesapeake, Ohio and Southwestern Railroad when she attempted to go from Memphis to Woodstock, Tennessee. She brought suit for breach of contract.⁸² The defendant demurred on the grounds that it had invited her to occupy a different first class coach, that it had a statutory right to designate a separate car, that the statute established a penalty in lieu of damages, and that there was no contention the other car was not equal.⁸³

A few days after the railroad entered its plea, her attorney, Thomas Cassils, told Ida Wells that the railroad ticket agent said she would not be forced from the ladies car again. Nevertheless, when she boarded the train in Woodstock heading for Memphis on May 4, 1884, the conductor barred her from entering the car for whites. He stopped the train next to the station and she got off rather than proceed in the colored car. She brought suit again.⁸⁴ Justice of the Peace John Elliott initially found for Ms. Wells in the amount of \$200. The case then went to Circuit Judge Pierce virtually simultaneously with the first case for a decision on an agreed statement of facts.⁸⁵

In the first case, Judge James Pierce found that the same cars were used by white passengers in one direction and black passengers in the other, but that white passengers considered the car for colored passengers to be one for smoking and drinking and the railway had not succeeded in preventing such behavior despite some attempts by the conductor. Judge Pierce held "she was thereby refused the first class accommodations to which she was entitled under the law. The policy of Tennessee upon this subject has been embodied in statutes."⁸⁶ He awarded her \$500 in damages on December 27, 1884, explaining:

A classification of its passengers by a railroad company, so as to separate the races, is not only within discretion because its patrons may so desire, but is required by the statutes before cited. The plaintiff's case, however, does not rest upon an objection to

SON, A TREATISE ON THE LAW OF CARRIERS 618-19 (Floyd R. Mechem ed., Callaghan & Co. 2d ed. 1891) (contrasting permissive nature of Tennessee's statute with Mississippi's requirement).

81. See Civil Rights Act Cases, 109 U.S. 3, 25 (1883) (declaring Civil Rights Act void as unauthorized by Thirteenth or Fourteenth Amendment).

82. See Transcript of Case at 4-7, Wells v. Chesapeake Ohio & Sw. Ry. Co., No. 8130 (Cir. Ct. Shelby County, Tenn. Mar. 31, 1885).

83. See *id.* at 7-10.

84. See *id.* at 4-7.

85. See *id.* at 7.

86. See *id.* at 64.

this classification. The wrong complained of is the failure to furnish with the classification, accommodations for the colored passengers equal to those accorded to the white passengers.⁸⁷

In the second case, Ms. Wells claimed that someone was smoking in the front car, however, this contention was denied by another deponent. Despite this disagreement, both parties agreed that smoking sometimes occurred in the front car but never in the rear car.⁸⁸ In December of 1884 the Court entered judgment for Ms. Wells for \$200.⁸⁹

Ida Wells claimed a right to sit where she wanted because her ticket did not preclude her from doing so. The common law, however, offered little support for that argument. The conductor had the power to tell passengers where to sit, subject only to limits set by the common law and the statute. Since Tennessee's statute in 1875 changed the common law, Wells had to rely on the 1882 statute to succeed in her suit. Instead of attacking the statute, her lawyers relied upon it to provide the basis for recovery for unequal treatment. Wells sued on the grounds that the Railroad failed to provide equal facilities as required by law but decided not to challenge the statute itself.⁹⁰

On appeal, her lawyer argued: "Accepting, therefore, the proposition of law that a common carrier has the right to separate passengers because of race, where it provides equal accommodation, we claim that under the facts of the case at bar we must recover."⁹¹ While the accommodations were physically equal, the allowance of smoking in the car not reserved for whites and the absence of white women from that car demonstrated that it

87. *Id.* at 68.

88. *See id.* at 11-12.

89. *See id.* at 15. The victory inspired her to write about the case that led to her subsequent career as a crusading journalist, who later became especially famous for her fight against lynching. *See generally* IDA B. WELLS, *CRUSADE FOR JUSTICE: THE AUTOBIOGRAPHY OF IDA B. WELLS* (1970).

90. Wells's lawyer, Thomas F. Cassels, was a representative when the 1881 bill was passed. He had abstained in that vote although two other black representatives voted against it. *See* JOSEPH H. CARTWRIGHT, *THE TRIUMPH OF JIM CROW: TENNESSEE RACE RELATIONS IN THE 1880s* 104 (1976) (citing *JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF TENNESSEE* 993 (Nashville: Tavel & Howell 1881)). Cassels asked Judge Thomas Greer to join him on the case. Wells was concerned that Cassels was not pressing her case and she replaced him with Greer as lead attorney in the second case and on appeal. *See also* LINDA O. McMURRY, *TO KEEP THE WATERS TROUBLED: THE LIFE OF IDA B. WELLS* 27-28 (1998); *THE MEMPHIS DIARY OF IDA B. WELLS* 56-57 (Miriam DeCosta-Willis eds., 1995) [hereinafter *MEMPHIS DIARY*].

91. Brief of Greer & Adams for Defendant in Error at 4, *Chesapeake Ohio & Sw. Ry. Co. v. Ida Wells*, 85 Tenn. 613 (1885). Since the railroad was a private carrier, which could not be compelled to refrain from segregating by the federal government, only a state statute or the common law obligations of carriers could provide a basis for suit. Invalidation of the 1881 statute could leave the 1875 Tennessee statute in place with respect to wholly intrastate operations, and that law abrogated the common law obligation and left the railroad free to discriminate on its own.

was not equal. If the cars were truly equal, white women would be indifferent as to which car they rode in.

Ignoring Ms. Wells's testimony and Judge Pierce's findings on smoking and drinking enforcement, the Supreme Court of Tennessee in *Chesapeake, Ohio & Southwestern Railroad v. Wells*⁹² reversed the award in her favor: "Having offered, as the statute provides, 'accommodations equal in all respects in comfort and convenience to the first-class cars on the train, and subject to the rules governing other first-class cars,' the company had done all that could rightfully be demanded."⁹³

The Court said that she was attempting to create a test case, and they would have none of it.⁹⁴ The opinion did not examine the constitutionality of the statute, but simply assumed it. Nothing in the case turned on whether the statute required segregation or merely permitted carriers to engage in it, thus, the issue was not discussed by the Supreme Court of Tennessee.

3. Memphis & Charleston R.R. v. Benson (1887)

Later that term, in *Memphis & Charleston Railroad v. Benson*,⁹⁵ the Court in an opinion by Justice Horace Lurton⁹⁶ characterized its decision in *Wells* without any statutory reference, saying that *Wells* held:

[T]hat a railway company may make reasonable regulations concerning the car in which a passenger might be required to ride, provided that equal accommodations were furnished to all holding first-class tickets, and that a regulation assigning a particular car to persons of color, that car being in all respects equal in comfort to any other in the train, was reasonable.⁹⁷

Justice Lurton cited *West Chester* and *Williams* in support of this proposition, both of which were common law carrier obligation cases with no statutory issue.⁹⁸

92. 85 Tenn. 613 (1887).

93. *Id.* Ms. Wells expressed her feelings regarding the judgment when she stated:

I felt so disappointed, because I had hoped such great things from my suit for my people generally. I have firmly believed all along that the law was on our side and would, when we appealed to it, give us justice. I feel shorn of that belief and utterly discouraged. . . .

MEMPHIS DIARY, *supra* note 90, at 140-41.

94. *See Wells*, 85 Tenn. at 615 ("We think it is evident the purpose of the defendant in error was to harass with a view to this suit, and that her persistence was not in good faith to obtain a comfortable seat for the short ride.").

95. 85 Tenn. 627 (1887).

96. Horace Lurton was subsequently appointed to the United States Supreme Court in 1910.

97. *Benson*, 85 Tenn. at 631.

98. *See id.*

A passenger may not dictate where he will sit, or in which car he will ride. If he is furnished accommodations equal in all respects to those furnished other passengers on the same train, he cannot complain; and this was the substance of our decision in the Wells case. The doctrine is equally applicable here.⁹⁹

Benson did not raise issues of race, and the statute did not cover them. He was evidently a nonsmoking man and refused to buy a ticket unless afforded a seat in the ladies car where smoking was prohibited. On its facts, the decision certainly did not hold anything relating to a racial statute, nor did the opinion even mention a statute. Its approving reference to *Wells* goes no further than the case itself, and suggests that the case merely accepted the common law limits on carrier discretion.

In short, of the five stated cases Justice Brown cited, only *Wells* involved a state statute that arguably compelled segregation. The decisions below awarded damages to Ida Wells on the basis of a violation of the statute. Thus, the decision of the Tennessee Court reversing the lower courts was premised on finding that she was treated equally. The short opinion in that case, however, did not determine whether the statute was obligatory or permissive, and it made no reference to constitutional issues. Because there was no challenge to the Tennessee statute, the Court was wrong to state that these cases held that a statute requiring segregation was constitutional.

C. *The Common Law Principle Applied in Federal Courts*

The string cite in *Plessy* included four cases from lower federal courts. The two federal court cases out of Maryland regarded libels in admiralty against steamships. In those cases, the court held that steamships were required to provide equal accommodations, but may be permitted to segregate. In the other two cases, plaintiffs sued railroads in federal court under diversity of citizenship. In those cases the federal court applied the general rule of common carriers that prohibited exclusion of prospective passengers but permitted separation of the races.

1. *The Sue* (1885)

In *The Sue*,¹⁰⁰ Martha Stewart and her sisters, Lucy, Margaret and Winnie, sued for damages because the steamship management prevented them from sleeping in the rear sleeping cabin for women. The four women had first class tickets and were seated in the first class parlor with all other first class passengers but had not purchased individual cabins. The ship took the position that the communal sleeping areas could appropriately be divided by race and by gender. The captain argued that the sleeping quarters in the front of the boat for colored women were equally as

99. *Id.*

100. 22 F. 843 (1885).

good as those for white women in the stern and, therefore, the sisters had been afforded all their rights. The Court said that "under some circumstances, such a separation is allowable at common law."¹⁰¹ Judge Thomas Morris, however, found that in this case, the plaintiffs demonstrated that their alternatives were not equally good and thus the separation violated the obligation of the steamship as a common carrier on water.

Far from being a case of holding a statute constitutional, Judge Thomas Morris said:

[T]he regulations. . . by which colored passengers are assigned to a different sleeping cabin from white passengers, is a matter affecting interstate commerce. *It is, therefore, a matter which cannot be regulated by state law*, and congress having refrained from legislation on the subject, the owners of the boat are left at liberty to adopt in reference thereto such reasonable regulations as the common law allows.¹⁰²

Carrier regulations would not be reasonable unless the first class colored passenger had first class accommodations equivalent to the standard of the other first class cabins. Judge Morris insisted that carriers must integrate their accommodations if they cannot provide perfectly equal facilities: "On many vehicles for passenger transportation, the separation cannot be lawfully made, and the right of steam-boat owners to make it depends on their ability to make it without discrimination as to comfort, convenience, or safety."¹⁰³

2. Logwood v. Memphis & C. R.R. Co. (1885)

Judge Morris's decision was read to the jury as part of the charge given in *Logwood v. Memphis & Central Railroad Co.*¹⁰⁴ In *Logwood*, the parties agreed that ordinarily railroad carriers seated respectable African-American women in the ladies car if they requested—and had done so previously for Mrs. Logwood. On this occasion, Mrs. Logwood sued because she was required to sit in the front car. The conductor insisted that he asked her to sit there temporarily and would have seated her in the ladies car as soon as he had finished his other duties. The court's charge in part dealt with the factual dispute, but it also noted that segregation would be permissible if the accommodations were equal. However, Judge Eli Shelby Hammond in *Logwood* insisted that "[e]qual accommodations do not mean identical accommodations."¹⁰⁵ Judge Hammond explained:

101. *Id.* at 845.

102. *Id.* at 844 (emphasis added) (citing *Hall v. DeCuir*, 95 U.S. 485 (1877)).

103. *Id.* at 848.

104. 23 F. 318 (1885).

105. *Id.* at 319. Hammond was an ex-confederate soldier appointed to the Western District for Tennessee in 1878 by President Rutherford Hayes to promote conciliation.

Common carriers are required by law not to make any unjust discrimination, and must treat all passengers paying the same price alike. Equal accommodations do not mean *identical* accommodations. Races and nationalities, under some circumstances, to be determined on the facts of each case, may be reasonably separated; but in all cases the carrier must furnish substantially the same accommodations to all, by providing equal comforts, privileges, and pleasures to every class.¹⁰⁶

Although *Logwood* was decided in Tennessee, Mrs. Logwood was traveling interstate between Huntsville, Alabama and Courtland, Tennessee. Judge Hammond's charge quoted the opinion in *Sue*, which referred to the common law standard while specifically repudiating any state power to regulate steamships traveling in interstate commerce.¹⁰⁷ Judge Hammond himself had previously held the 1875 Tennessee statute invalid as an improper regulation of interstate commerce.¹⁰⁸ Thus, Judge Hammond's *Logwood* charge was directed to the common law rule and did not involve any statute.

3. McGuinn v. Forbes (1889)

The cases through 1887 established the proposition that common carriers could segregate as long as they provided substantially equal facilities to members of different races. In many of these cases, African American plaintiffs prevailed by demonstrating that the facilities were not equal. In *McGuinn v. Forbes*,¹⁰⁹ the plaintiff's attorney argued that separation was inherently unequal. While aboard the steamboat *Mason Weems*, Reverend Robert McGuinn sat down at a dining table occupied by white passengers. When the passengers protested, the captain asked McGuinn to move. When he refused, the captain told the white passengers they could move to the table reserved for blacks if they wished to avoid McGuinn's presence, which they did. Reverend McGuinn sued the Steamship owners, but was prohibited from arguing inequality in facilities because he was seated at the table reserved for white passengers. Instead, his counsel, Everett Waring, argued that separate was inherently unequal.¹¹⁰ That argument proved to be ahead of its time, and the federal courts held that McGuinn failed to show any inequality. Like the *Steamer Sue* case before

106. *Id.*

107. *The Sue*, 22 F. at 844 ("[T]he regulations made by her owners and enforced on board of her, by which colored passengers are assigned to a different sleeping cabin from white passengers, is a matter affecting interstate commerce. It is, therefore, a matter which cannot be regulated by state law.")

108. See *Brown v. Memphis & C.R. Co.*, 5 F. 499, 501 (C.C.W.D. Tenn. 1880).

109. 37 F. 639 (D. Md. 1889).

110. Brief of Libellant at 6, *McGuinn v. Forbes*, 37 F. 639 (4th Cir. 1889). "The Courts while justifying *separate* accommodations, require *equal* accommodations. This is as impossible as to have all points of the earth *simultaneously* equidistant from the sun." *Id.*

the same judge four years earlier, this admiralty libel had nothing to do with any statute.

4. *Houck v. Southern Pac. Ry. Co.* (1888)

The last federal court case in the string citation was a successful suit brought by Mrs. Lola Houck.¹¹¹ In the case, Mrs. Houck suffered a miscarriage after riding on the outside platform of a train when she traveled from Victoria to Galveston, Texas to be with her ill child who was staying with his grandmother.¹¹² The jury awarded Mrs. Houck \$5000 in damages for the behavior of the conductor in refusing to allow her to ride in the rear car, and attempting to force her into the "Jim Crow" car.¹¹³ The Circuit Court agreed that the "Jim Crow car" was not as comfortable or inviting as the other car.¹¹⁴ The circuit court judge refused to order a new trial, although he did require a reduction in the amount of damages.¹¹⁵ The appellate decision focused on issues of fact, but it also referred to the trial court's charge that a railway company:

[M]ay or might be, under a proper showing of facts, justified and authorized in law, in the management of its complicated interests, in setting apart one or more coaches for the use exclusively of white people, and to set apart other cars for the use exclusively of colored people; but when the management undertakes to carry out such a rule it is charged with the duty of giving or furnishing to the colored passenger who pays first-class fare over the line a car to ride in as safe, and substantially as inviting, to travel in, as it (the management) furnishes to white passengers.¹¹⁶

These four federal court cases cited in Justice Brown's opinion demonstrated that federal courts applied the common law of carriers to require private companies to furnish equal accommodations if they separated their passengers. None, however, addressed whether the state could require such a separation, since that was never at issue in any of the cases. Thus, Justice Brown had no basis for his statement in *Plessy* that these cases held constitutional a state segregation statute.

D. *The Constitutional Power of a State to Prohibit Discrimination: People v. King* (1888)

Between the citations to *McGuinn* and *Houck*, Justice Brown cited *People v. King*,¹¹⁷ an 1888 suit in New York concerning a skating rink. Rather

111. See *Houck v. S. Pac. Ry. Co.*, 38 F. 226 (C.C.W.D. Tex. 1888).

112. *Id.* at 227 (discussing treatment of Mrs. Houck while onboard train).

113. See *id.* at 229 (outlining jury's decision).

114. See *id.* at 229.

115. See *id.* at 229-30 (discussing judge's decision not to order new trial).

116. *Id.* at 228.

117. 110 N.Y. 418 (1888).

than compelling separation, the New York Penal Code Section 383 forbade racial discrimination in a variety of public accommodations.¹¹⁸ Unlike all the other cases cited, this decision did not involve transportation, although the statutory language included common carriers. The decision indicated that states could regulate the way that common carriers treated their passengers, but it did not imply that the regulation could require the common carrier to separate its passengers.

Defendants were indicted for refusing to sell skating exhibition tickets to three colored men. The defense was based on the contention that the law was an unconstitutional deprivation of their property rights. The defendants admitted that carriers and inns could be regulated,¹¹⁹ but contended that a skating rink could not.¹²⁰

The New York court upheld the statute as a proper use of the police power.¹²¹ Its rationale was based on the public purpose of preventing discrimination. Indeed the Court said, "The state could not pass a law mak-

118. See N.Y. PENAL LAW § 383 (McKinney 2007). Section 383 of the Penal Code declares that:

[N]o citizen of this state can, by reason of race, color or previous condition of servitude, be excluded from the equal enjoyment of any accommodation, facility or privilege furnished by inn-keepers or common carriers, or by owners, managers, or lessees of theaters or other places of amusement, by teachers and officers of common schools and public institutions of learning, or by cemetery associations.

Id.

119. See Bogen, *Innkeeper's Tale*, *supra* note 38, at 52. Over the centuries, since the beginning of the common carrier doctrine in England, the focus had shifted from protection of clients to the public nature of the occupation. This helped lead to the historically incorrect assumption that the obligations of the common carrier existed because of its unique status as a "public" occupation. *Id.* The "public" business was a step beyond merely "affected with a public interest" so defendants in *King* assumed that regulation of carriers was appropriate for government. *Id.*

120. See *King*, 110 N.Y. at 419. In *King*, the court stated:

May not the state impose upon individuals having places of public resort the same restriction which the Federal Constitution places upon the state. It is not claimed that that part of the statute giving to colored people equal rights, at the hands of innkeepers and common carriers, is an infraction of the Constitution. But the business of an innkeeper or a common carrier, when conducted by an individual, is a private business, receiving no special privilege or protection from the state. By the common law, innkeepers and common carriers are bound to furnish equal facilities to all, without discrimination, because public policy requires them so to do. The business of conducting a theater or place of public amusement is also a private business in which any one may engage, in the absence of any statute or ordinance. But it has been the practice, which has passed unchallenged, for the legislature to confer upon municipalities the power to regulate by ordinance the licensing of theaters and shows, and to enforce restrictions relating to such places, in the public interest, and no one claims that such statutes are an invasion of the right of liberty or property guaranteed by the Constitution.

Id. at 427.

121. See *id.* at 418. In its holding the New York court provided the following rationale:

ing the discrimination made by the defendant."¹²² That certainly does not hold it is constitutional for a state to require parties to segregate.

E. *Federal Non-Discrimination Statute Interpreted to Permit Separate If Equal*

The last cases in Justice Brown's string were decisions of the Interstate Commerce Commission. William H. Heard, a former slave who became a bishop in the African Methodist Episcopal (AME) church, was the complainant in both, and the Georgia Railroad Company was the defendant.¹²³ The issue in each commission was whether the railroad company violated federal law prohibiting discrimination.

1. *Heard v. Georgia R.R. Co. (1888)*

In 1887, Reverend Heard, minister of Mt. Zion AME church in Charleston, South Carolina bought a ticket in Ohio to travel back to South Carolina. He had to change trains in Atlanta for the trip to Augusta, and the Georgia Railroad Company separated the passengers. Reverend Heard brought a complaint before the Interstate Commerce Commission because the Georgia Railroad Company prevented him from going into the rear car, which it reserved solely for white passengers, and forced him to ride in the "Jim Crow" car, where a partition separated smokers of all races and genders from an area reserved for only colored people. The Jim Crow car had no carpet, no upholstery on the seats, and no ice water. The Commission concluded that Reverend Heard was discriminated against solely because of his color. They found his accommodations were inferior in violation of Section 3 of the Interstate Commerce Act, which prohibited discrimination.¹²⁴

We have referred to these amendments and to the cases construing them, because they disclose the fact that, in the judgment of the nation, the public welfare required that no state should be permitted to establish by law such a discrimination against persons of color as was made by the defendant in this case, for we think it incontestable, that a State law excluding colored people from admission to places of public amusement would be considered as a violation of the Federal Constitution. It would seem, indeed, in view of the act of March 1, 1875, that, in the opinion of congress, the amendments had a much broader scope, and prevented not only discriminating legislation of this character by the state, but also such discrimination by individuals, since the jurisdiction of congress to pass a law forbidding the exclusion of persons of color from places of public amusement, and annexing a penalty for its violation, must be derived, if it exists, from the thirteenth, fourteenth and fifteenth amendments. It cannot be doubted that before they were adopted the power to enact such a regulation resided exclusively in the states.

Id. at 425-26.

122. *Id.* at 427.

123. WILLIAM H. HEARD, FROM SLAVERY TO BISHOPRIC IN THE A.M.E. CHURCH: AN AUTOBIOGRAPHY 13 (1924). Interestingly, Bishop Heard's autobiography makes no mention of the litigation before the ICC.

124. See *Heard v. Georgia R.R. Co.*, 1 I.C.C. 719 (1888).

Commissioner Schoonmaker's opinion in *Heard* referred to the commission's earlier decision in *Councill v. Western & Atlantic Railroad Company*,¹²⁵ and said that the "decision was based upon the principles of justice and equality in the transportation of persons and property embodied in the Act, and resting upon no less a foundation than the Constitution of the United States."¹²⁶ The Commission insisted that separation required equality, but separation itself was permissible.

Heard's lawyers had "urged identity of white and colored passengers paying the same fare as the only absolute equality under the law"¹²⁷ but Commissioner Schoonmaker distinguished other statutes and held that:

Identity, then, in the sense that all must be admitted to the same car and that under no circumstances separation can be made, is not indispensable to give effect to the statute. Its fair meaning is complied with when transportation and accommodations equal in all respects and at like cost are furnished and the same protection enforced.¹²⁸

Nevertheless, on February 15, 1888, the Commission issued a cease and desist order against the Georgia railroad.¹²⁹

2. *Heard v. Georgia R.R. Co. (1889)*

In August of 1888, Reverend Heard was appointed minister to Allen Chapel in Philadelphia. While there performing his duties, he studied at the Reformed Episcopal Seminary.¹³⁰ On January 25, 1889, he purchased a railroad ticket to Atlanta by way of Augusta. Despite the order of the Commission in the first case, Reverend Heard was again directed to a partitioned car, but one with cocoa matting on the floor and plush seats. The white car had an improved heating system and the smoking section of the Jim Crow car switched sides whenever the train made its return trip so the tobacco smoke sank into the car. Reverend Heard filed another complaint. Once more, the Commission found that he was required to travel in a car inferior in accommodations, and it issued a cease and desist order to the railroad company.¹³¹ Commissioner Bragg's opinion in the second case also held that the railway company should provide equal protection

125. 1 I.C.C. 339, 340 (1887); see also *Heard*, 1 I.C.C. at 720.

126. *Heard*, 1 I.C.C. at 721.

127. *Id.* at 722.

128. *Id.*

129. See *id.*

130. See *HEARD*, *supra* note 123, at 75-76.

131. See *Heard v. Ga. Ry. Co.*, 2 I.C.C. 508 (1889). The Supreme Court in *Plessy* cites the second case first, and uses S.C. to indicate "same case" when it cites the earlier decision. But the decisions were on two separate complaints although the issues were essentially the same and the parties were identical.

to passengers in both cars to keep them from disorderly conduct of other passengers.¹³²

The cease and desist orders may have given Bishop Heard some comfort, but the failure to follow the first order suggests that the comfort was minimal. In any event, the cases and the orders required equal accommodations where the carriers decided to separate the races, but gave no discussion of the constitutionality of any statutes that required segregation. Thus, the Supreme Court erred in citing these two decisions of the Interstate Commerce Commission as finding a statute that required segregation was constitutional. They did not. Rather, they interpreted a federal statute that prohibited discrimination to require no more than the common law obligations of common carriers. They found that private carriers did not violate the federal statute when they provided separate but equal accommodations. The difference between permissible and required is huge, but the Supreme Court ignored it when they cited the two decisions in *Heard*.

In sum, of the twelve cases cited by the Supreme Court in *Plessy*, only one case, the suit by Ida Wells, involved a statute that even arguably required segregation. Although Wells's suit involved a statute that may have required a separate car, the statute was crucial to her claim and neither side challenged it. Thus, the Court did not hold anything about its constitutionality. Eight cases discussed the common law requirement of equality when common carriers decided on their own to segregate, and the remaining three involved statutes that *prohibited* discrimination. Courts and agencies used the common law requirement of "equality" to interpret anti-discrimination statutes to permit segregation, but the source of the discrimination in every case was the decision of the private carrier or amusement park, not the compulsion of a statute.

IV. JUSTICE BROWN'S KNOWLEDGE OF THE CASES

This article so far has demonstrated that the opinion of the Supreme Court in *Plessy* made a false statement of fact; the citations did not support Justice Brown's statement. It is more difficult to determine whether Justice Brown knew that the cases he cited did not hold any segregation statute constitutional. Even a cursory reading of the cases reveals that they are not statutory holdings, but he could have cited them without having read them.

Courts sometimes get incorrect ideas from the assertions and citations of the litigants; however, only a few of the cases that the *Plessy* Court used in the string cite were mentioned in the briefs or opinions below or presented to the Court in the attorneys' briefs. Even the secondary sources cited by the parties did not arrange the cases in this fashion. Thus, the responsibility for the misstatement lies with Justice Brown, who

132. See *id.* at 511.

almost certainly knew that at least some of the cases did not stand for the proposition he asserted.

A. *Cases Not Cited in the Record Before the Court*

There is no mention of *Day*, *Williams*, *Benson*, *McGuinn*, *King*, *Houch*, or either of the *Heard* cases in the opinions below or in any of the briefs. Consequently, Justice Brown must have turned to other sources to find cases to buttress his conclusion. He probably found them in Section 542 of Hutchinson's *Law of Carriers* (hereinafter "*Hutchinson on Carriers*").¹³³ All but one of the cases in the string citation appear there and no other secondary work cited in the record included so many of the cases. Justice Fenner cited *Hutchinson on Carriers* in his opinion for the Louisiana Supreme Court in *Plessy*, and that opinion constituted much of defendant Ferguson's brief before the Supreme Court.¹³⁴ Thus, Justice Brown likely saw the citation to *Hutchinson on Carriers* as a basic source for carrier law.

The briefs and opinions below did not distinguish between citing school cases and citing carrier cases. Justice Brown did. The grouping of state common law, Tennessee cases, federal court decisions and finally Interstate Commerce Commission cases generally follows their presentation in *Hutchinson on Carriers*. But the treatise made it clear that the cases were about the carrier's power to segregate and not the state's authority to require segregation. The text focused on the carrier's right to have separate classes with separate fares, but it suggested the separation might also be based on type of accommodations or persons to be carried.¹³⁵ It said nothing about any law requiring segregation, but only discussed the power of the carrier to make its own decision to segregate:

Provision is accordingly made for such a separation, almost universally, by steamboats and railway carriers, and the necessary regulations to enforce it are adopted, and such regulations have been held to be not only lawful but highly commendable, as be-

133. See HUTCHINSON, *supra* note 80, at 619.

134. The briefs for Ferguson and the state incorporated most of the prior material on his behalf. 13 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 81-134 (Kurland & Casper eds., 1975) [hereinafter LANDMARK BRIEFS] (noting Fenner's opinion at 123-33). The brief of M.J. Cunningham, the Attorney General of Louisiana, was largely written by Lionel Adams, of counsel, along with Alexander Porter Morse. It recited the facts including Ferguson's opinion, Plessy's petition, the answer, etc. The brief basically quoted the substantive argument from Adams' brief to the Supreme Court of Louisiana with citations to the Encyclopedia of Law, *Logwood* and *The Sue* as well as the *Louisville* case. The brief stated that the Attorney General could not devote the time to the brief he intended, so he copied the opinion of Justice Fenner for the Louisiana Supreme Court in the brief. "It thoroughly covers the grounds presented in the case and we therefore embody it in full." *Id.* at 122.

135. See HUTCHINSON, *supra* note 80, at 619.

ing conducive both to the public convenience and to the interest of the carrier.¹³⁶

The footnote to this discussion of the common law obligation of carriers contained all the carrier cases mentioned in the briefs and most of the string citation cases that were not mentioned in the briefs.¹³⁷ Thus, if Justice Brown took the cases from this source, he should have known that they dealt with the approval of regulations made by railways and steamboat companies and not with state statutes.

1. Day v. Owen

Henry Billings Brown was a Michigan lawyer. His autobiography states that he spent his time in 1860 familiarizing himself with all the Michigan cases in the first twelve volumes of the Michigan Reports, therefore, he must have known *Day*,¹³⁸ even if he was unaware of its later overruling. He knew also from the citation that it arose prior to the Civil War, and therefore could not involve the Fourteenth Amendment. As an admiralty lawyer in Michigan, he should have been particularly sensitive to that case.¹³⁹

Day was cited in the first paragraph of the footnote in *Hutchinson on Carriers* as an exemplar of the steamboat's power to separate passengers. In the second paragraph of the footnote, the author said that the case held "a carrier by steamboat might lawfully make and enforce a regulation excluding such passengers from the cabin appropriated to white passengers."¹⁴⁰ Thus both text and footnote demonstrated without doubt that *Day* did not involve a statute, but a regulation made by the carrier itself.

Further, Brown discussed *Hall v. De Cuir*¹⁴¹ in his *Plessy* opinion. Justice Clifford's concurring opinion in *Hall* discussed *Day* and said it determined that the place where passengers may go on a ship "is, where such

136. *Id.*

137. *See id.* at 619 n.1.

138. MEMOIR OF HENRY BILLINGS BROWN (Charles Kent ed., Duffield & Co. 1915), available at http://www.supremecourthistory.org/04_library/subs_volumes/04_c04_a.html [hereinafter BROWN MEMOIRS].

In the autumn [of 1860] I took a modest office which I shared with Bela Hubbard, a valued friend and eminent citizen, and devoted myself less to the practice of law, which was meagre enough, than to familiarising myself with the Michigan Reports, of which there were then only a dozen volumes.

Id.

139. There is no indication in the decision that it is admiralty and *Day* was decided long before the Supreme Court in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), superseded by statute as stated in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980), held that admiralty law is federal, and states must apply federal admiralty law. *Id.* at 218. Brown, however, as an admiralty lawyer, should at least have been sensitive to the facts of a case in his home state that dealt with the operation of a vessel on navigable waters.

140. HUTCHINSON, *supra* note 80, at 619 n.1.

141. 95 U.S. 485 (1877).

rules and regulations exist, to be determined by the proprietors."¹⁴² Thus, Justice Brown may have cited *Day* because it was so familiar to him, but even if he found it elsewhere, he would have known that it did not involve a statute.

2. *Chicago & Nw. Ry. Co. v. Williams*

The second paragraph of the footnote in *Hutchinson on Carriers* discussed *Day* and *West Chester* and added *Williams*. The discussion described *West Chester* as involving a "regulation of a similar character."¹⁴³ After quoting Agnew's statement that separation was sanctioned by law and custom from the foundation of the government, the footnote said: "It was also conceded by the court in the case of *The Chicago, etc. R.R. v. Williams*, 55 Ill. 185."¹⁴⁴ Its antecedent appears to be the principle that a carrier's regulation separating the races was permissible. Nothing in the discussion suggested that *Williams* involved any statute. Further, in contrast to the paragraph in which *Day*, *West Chester* and *Williams* appeared, the next paragraph involved a discussion of statute.

3. *Memphis & Charleston R.R. v. Benson*

The third paragraph of the footnote to the ability of carriers to segregate their passengers began with the Tennessee decisions:

The Code of Tennessee, § 2366, permits the separation of whites from blacks where equal accommodations are afforded. See *Chesapeake, etc. R. Co. v. Wells*, 85 Tenn. 613; *Memphis, etc. R. Co. v. Benson*, 85 Tenn. 627. This is required in Mississippi. See *Louisville etc. R'y Co. v. State*, 66 Miss. 662.¹⁴⁵

Note that the discussion of the Tennessee statute stated that it was permissive rather than mandatory and distinguished it from the requirement of the Mississippi statute in *Louisville*. Although Justice Brown could have taken from the citation the incorrect impression that *Benson* involved the Tennessee statute, it was clear that the author of the treatise did not believe that the statute required segregation. So if *Hutchinson on Carriers* was Brown's source for the *Benson* and *Wells* decisions, he would have known that those cases did not uphold a statute requiring segregation.¹⁴⁶

Brown should have had a particular awareness of the Tennessee cases because they were decided in the Sixth Circuit, though in state rather than federal court. But his awareness may have led him to misunderstand their

142. *Id.* at 501.

143. *HUTCHINSON*, *supra* note 80, at 619 n.1.

144. *Id.* at 620 n.1.

145. *Id.*

146. See, e.g., *id.* at 621 n.1. Further, *HUTCHINSON ON CARRIERS* cited *Benson* for the proposition that a regulation that created a "ladies car" would be reasonable and valid. *Id.* Thus, Brown should have known that *Benson* was a gender rather than a race case and could not have been a holding on a racial segregation statute.

significance. Perhaps Justice Brown first heard about the cases in casual conversation. Justice Howell E. Jackson was one of Justice Brown's closest friends on the Supreme Court from the days of their working together on the Sixth Circuit.¹⁴⁷ Justice Jackson came from Tennessee and was circuit judge for the Sixth Circuit when *Benson* and *Wells* were decided. Although Jackson died the year before *Plessy* came before the Court, he may have mentioned the state law and these decisions in general terms. Thus, it is not as clear as *Day* that Justice Brown knew that these cases did not uphold a statute requiring segregation.

4. *McGuinn v. Forbes*; *Houck v. Southern Pac. Ry. Co.*

Immediately after citing the Tennessee cases and the Mississippi law, the footnote in *Hutchinson on Carriers* cited all of the federal court cases used in *Plessy*'s string cite:

Such separation is held lawful either as to cars, state-rooms, berths or tables where the carrier, in good faith, endeavors to give equal accommodations to each. *Houck v. Railway Co.* 38 Fed. Rep. 226; *McGuinn v. Forbes*, 37 Fed. Rep. 639; *The Sue*, 22 Fed. Rep. 843; *Murphy v. Railroad Co.* 23 Fed. Rep. 637; *Logwood v. Railroad Co.* 23 Fed. Rep. 318.¹⁴⁸

One might in confusion think "such separation" refers to the required separation of the Mississippi statute rather than the general proposition of permitting separation when it was equal; however, this is a very unlikely reading. Where statutes existed, the footnote specified them—Tennessee, Mississippi. The entire footnote was to a text on the carrier's right to separate the races, and the rest of the paragraph in the footnote did not discuss statutes requiring separation but rather *Coger v. The Packet Co.*,¹⁴⁹ a decision that prohibited a steamboat company from enforcing regulations discriminating against the races.¹⁵⁰ The use of *Coger* contrasted the carrier's right to separate the races with a statute that prohibited it.

5. *The Heard Decisions*

The next sentence in the text in *Hutchinson on Carriers* referred to gender separation on common carriers. The footnote to this sentence

147. Irving Schiffman, *Howell E. Jackson*, in 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT 800 (Leon Friedman & Fred Israel eds., Chelsea House Publishers 1997). Jackson was elected to the state legislature in 1880, but after taking his seat he soon was elected to the United States Senate, and took office there before the Tennessee segregation law passed. *Id.* at 797. He served with Brown on the Sixth Circuit in 1886, just a year after Judge Hammond's charge in *Logwood*. He lived in Nashville when the opinions in *Wells* and *Benson* came down.

148. HUTCHINSON, *supra* note 80, at 620 n.1.

149. 37 Iowa 145 (1873).

150. See HUTCHINSON, *supra* note 80, at 620 n.1 (discussing *Coger*).

cited the *Heard* decisions by the Interstate Commerce Commission. It quoted heavily from the second decision, but had a "[s]ee further" reference to the earlier decision "where it is held that colored people may be assigned to separate cars if they are given equal accommodations and protection."¹⁵¹

Justice Brown must have known that segregation was not required by any statute of the United States, but the races were separated because the carrier decided to do so. The citation form and the discussions of *Heard* in *Hutchinson on Carriers* demonstrate that the question was under the Interstate Commerce Act. There is no excuse for Justice Brown to cite *Heard* as upholding a statute requiring segregation. He had to know that it did not.

6. *People v. King*

People v. King is the only case in the string citation that does not appear in *Hutchinson on Carriers*. Justice Brown may have gotten his reference to *King* from the *The American and English Encyclopedia of Law*¹⁵² (hereinafter A&E Encyclopedia). Defendant's attorney Lionel Adams relied upon the Encyclopedia and Justice Fenner quoted from it as well. The A&E Encyclopedia provided that the regulation of individuals' civil rights is a proper subject for the exercise of the police power. It gave as examples various laws securing equal public accommodations, and it cited *King* in support.¹⁵³ The citation to *King* appears in the carryover footnote on the same page as a footnote citing some of the common carrier cases. The A&E Encyclopedia makes clear on the prior page that the police power is usually used to end discrimination, and that *King* is the prominent example for that proposition. Justice Brown should have known, therefore, that *King* did not uphold a law requiring segregation.

Another possible source for the citation was Justice Brown's new colleague, Rufus Peckham. When Peckham was on the New York Court of Appeals, he dissented in the *King* decision. Peckham certainly knew what that case was about, and yet he joined in the opinion without making any apparent objection to Justice Brown's use of it in the string citation.

B. Cases Cited in the Record

Justice Brown may have been misled with respect to four of the cases by the citations of the attorneys and the court below. Lionel Adams brief for Ferguson to the Supreme Court of Louisiana said: "Laws may be enacted providing for separate schools for the different races and separate accommodations by common carriers. 18 A. and E. Ency. Law pp. 753,

151. *Id.* at 621-22 n.1.

152. See 18 THE AMERICAN & ENGLISH ENCYCLOPEDIA OF LAW 753-54 (John Houston Merrill ed., Edward Thompson Co. 1892) [hereinafter A&E ENCYC. L.].

153. See *id.*

754 and authorities cited."¹⁵⁴ This sentence was repeated in the brief to the U.S. Supreme Court.¹⁵⁵

The A&E Encyclopedia, cited by Adams, used four of the cases in the string citation for the proposition that laws providing for separate accommodations by private carriers were within the state police power. The Encyclopedia provided that "the regulation of the civil rights of individuals is unquestionably a proper subject for the exercise of a State's police power," giving as examples various "statutes" securing equal public accommodations.¹⁵⁶ It added "also laws providing for separate schools for the different races, and separate accommodations by common carriers."¹⁵⁷ The authority for this statement was in the footnote. The footnote first cited the Supreme Court's *Louisville* case, then several cases upholding school segregation statutes and finally added:

The same principle has been upheld in the case of common carriers in *West Chester etc. R. Co. v. Miles*, 55 Pa. St. 209; *The Sue*, 22 Fed. Rep. 843; *Logwood v. Memphis etc. R. Co.*, 23 Fed. Rep. 318; *Murphy v. Western etc. R. Co.*, 23 Fed. Rep. 637; *Chesapeake etc. R. Co. v. Wells*, 85 Tenn. 613."¹⁵⁸

Four of these cases (*West Chester*, *The Sue*, *Logwood* and *Wells*) are in the string citation. The Encyclopedia seems to assert that they support the proposition that laws for separate accommodations by common carriers are within the police power of the state, but there is an ambiguity. The footnote's four preceding paragraphs named specific statutes, acts or provisions of the Constitution, but the paragraph on common carriers did not. Thus, it is not entirely clear whether the "principle" that the cases upheld was one of state power to require segregation by statute or only the principle of segregation. It seems most likely that the author believed that the same principle applied to common carrier rules and state laws—that they could require racial separation if substantially equal facilities were provided.

Judge Fenner's opinion for the Louisiana State Supreme Court in *Plessy* adopted that view. His citation of *Miles*, *Wells*, *Logwood* and *Murphy* mingled statutes and regulations by the common carrier in a string citation that hid which case applied to what proposition. Thus, the Louisiana Court did not claim that any of those cases dealt with a statute. Instead, Judge Fenner treated the validity of the regulation made by a common carrier as equivalent to the validity of a statute requiring segregation. In

154. Brief of Lionel Adams for Respondent, at 27, *Ex Parte Homer A. Plessy*, No. 11134 (La. Dec. 1892).

155. Brief on Behalf of Defendant in Error to the Supreme Court of the United States, in *LANDMARK BRIEFS*, *supra* note 134, at 84, 117.

156. A&E ENCYC. L., *supra* note 152, at 753-54.

157. *Id.*

158. *Id.* at 754-55.

both cases he believed the applicable principle called for equality of rights and not identity of rights:

But the validity of such statutes *and of similar regulations made by common carriers in absence of statute*, and the validity of similar regulations or statutes as applied to public schools, has arisen in very many cases before the highest courts of the several states, and before inferior federal courts, resulting in an almost uniform course of decision to the effect that statutes or *regulations* enforcing the separation of the races in public conveyances or in public schools, so long, at least, as the facilities or accommodations provided are substantially equal, do not abridge any privilege or immunity of citizens, or otherwise contravene the fourteenth amendment.

. . . .

We refer to the following among other numerous, decisions: Railroad Co. v. Miles, 55 Pa. Stat., 209; . . . Louisville, N.O. & T. Ry. Co. v. State, 66 Miss. 662; . . . Railroad Co. v. Wells, 85 Tenn. 613; . . . The Sue, 22 Fed. Rep. 843; Logwood vs. Railroad Co., 23 Fed. Rep. 318; . . .

. . . They all accord in the general principle that, in such matters, equality, and not identity or community, of accommodations, is the extreme test of conformity to the requirements of the fourteenth amendment.¹⁵⁹

The brief of Alexander Porter Morse to the Supreme Court of the United States on behalf of Judge Ferguson also mentioned the same four cases. Morse did not say that the cases upheld such statutes. Instead, he wrote that they provided reasoning that led to the conclusion that the power to segregate was committed to the authority of local state governments.¹⁶⁰

The briefs and the opinion blur the difference between segregation by the private carrier allowed by common law and racial separation required by statute. The briefs and opinions below may have supported Justice Brown's belief that the cases held that segregation statutes did not violate the Fourteenth Amendment,¹⁶¹ but they mentioned only four of the twelve cases that he cited, and were vague on the exact holding of those cases. The question is whether Judge Brown knew or should have known that these cases dealt with regulations by carriers and not with state statutes. In this connection, we should look at the cases one by one.

159. *Ex parte* Homer A. Plessy, 11 So. 948, 950 (La. 1893) (emphasis added).

160. See LANDMARK BRIEFS, *supra* note 134, at 248.

161. See Barton J. Bernstein, *Case Law in Plessy v. Ferguson*, 47 J. NEGRO HIST. 192, 195 n.15 (1962) ("The Supreme Court was probably misled by the Louisiana high court and cited some of the cases.").

1. West Chester and Phila. R.R. Co. v. Miles

Henry Billings Brown was an attorney and director of a street railway company in 1875, a time when *West Chester* was the primary precedent for separate but equal as a common law rule. Further, in his opinion in *Plessy*, Justice Brown discussed *Hall*.¹⁶² Justice Clifford's concurring opinion in *Hall* itself discussed *West Chester*, saying:

[T]he Supreme Court of Pennsylvania decided directly that a public carrier may separate passengers in his conveyance; and they deduce his power to do so from his right of private property in the means of conveyance, and the necessity which arises for such a regulation to promote the public interest.¹⁶³

Recognition of a carrier's property right to determine whether to segregate its passengers is a far cry from recognizing state restrictions on its property right that would compel it to segregate.

When the Louisiana Supreme Court in *Ex parte Plessy* quoted *West Chester*, it acknowledged that the case preceded the Fourteenth Amendment.¹⁶⁴ Although the Louisiana Supreme Court asserted that the Fourteenth Amendment made no difference, Justice Brown knew that *West Chester* could not have held any law constitutional with respect to an Amendment that had not yet been adopted.

Finally, it seems likely that Justice Brown found most of the cases he cites in the string citation in *Hutchinson on Carriers*.¹⁶⁵ That book, however, discusses *West Chester* in a footnote, in which there is a discussion of the right of the common carrier to separate passengers, but which does not have anything to do with a statutory requirement. In view of his background in transport law, the ambiguity of the discussion of *West Chester* in the record, the acknowledgement by the Louisiana court of its timing, and the discussion of *West Chester* in *Hutchinson on Carriers*, Justice Brown should have known that *West Chester* did not support his claim that it upheld the statute.

2. The Sue and Logwood v. Memphis R.R. Co.

Judge Brown was an admiralty practitioner, author of *Brown's Admiralty Reports* (1876) as well as *Cases on Admiralty* (1896), which he used for his lectures on admiralty at Georgetown.¹⁶⁶ He could see from the name of the case that *The Sue* was a libel in admiralty, and he should have known that no statute was involved. Similarly, *Logwood* was a Sixth Circuit opinion while Brown was a federal district judge in that circuit. If he discussed the

162. See *Plessy v. Ferguson*, 163 U.S. 537, 546 (1896) (discussing *Hall v. De Cuir*, 95 U.S. 485 (1877)).

163. *Hall*, 95 U.S. at 503 (Clifford, J., concurring).

164. See *Ex parte Plessy*, 11 So. 948, 950-51 (1892).

165. See HUTCHINSON, *supra* note 80, at 619.

166. See 4 BROWN MEMOIRS, *supra* note 138.

case law and decisions of his fellow judges, he should have recognized the case.¹⁶⁷

Justice Brown may not have seen the brief that Plessy's lawyers filed in the Louisiana Supreme Court, which specifically stated that *Logwood* and *The Sue* did not involve statutes.¹⁶⁸ But Judge Ferguson's opinion, the matter appealed from, quoted extensively from *Logwood*, including the portion of the charge involving the conductor's claim that he was going to admit her into the ladies car.¹⁶⁹ Further, Judge Ferguson specifically referred to the carrier's right to segregate where accommodations were equal in the Maryland admiralty case.¹⁷⁰ In light of Judge Ferguson's use of the cases to demonstrate the reasonableness of the carrier's decision rather than the validity of a statute, and Justice Brown's facility with admiralty law and his work on the Sixth Circuit, he should have recognized that these two cases involved a regulation by a carrier and not by the state.

3. Chesapeake R.R. Co. v. Wells

Unlike *Logwood*, *West Chester* and *The Sue*, the record did not reveal much discussion of *Wells*. The opinion in *Wells* was brief, and lawyers and courts used it primarily as part of a string citation rather than discussing it. It was singled out, however in *Hutchinson on Carriers*, which stated that the statute in Tennessee permitted carriers to segregate and contrasted it to the Mississippi statute that required segregation.

In short, Justice Brown should have recognized from the ambiguity of the references and from his prior experiences that these cases did not

167. The discussion of both *The Sue* and *Logwood* in the briefs and opinions below suggested that they were common carrier cases. See, e.g., LANDMARK BRIEFS, *supra* note 134, at 27. For example, after saying "even in the absence of any legislation on the subject the common carrier was at liberty to adopt in reference thereto such reasonable regulations as the common law allows," attorney Adams cited *The Sue* in his brief to Louisiana Supreme Court for the proposition that passengers may be separated by race. Brief of Lionel Adams for Respondent, at 27, Ex Parte Homer A. Plessy, No. 11134 (Dec. 1892); see also *id.* (citing *Logwood* for proposition that equality did not mean identity). The briefs for Ferguson and the State before the United States Supreme Court incorporated most of the prior material on his behalf, but not these statements.

168. See Brief of Relator for Writs of Prohibition and Certiorari to the Judge of Section A Criminal District Court for the Parish of Orleans at 22, Ex Parte Plessy, No. 11134 (La. Nov. 30, 1892). The Brief explained:

The three cases referred to by the Honorable Court *a qua*, in the opinion were suits by passengers against common carriers for discrimination as to accommodations; they did not involve the validity of a State law, nor any Federal question. *Logwood and Ux. vs. M. & C.R.R.*, 23 Fed. Rep., p. 318; *The Sue*, 22 Fed. Rep., p. 843; *Murphy vs. W. & A. R.R.*, 23 Fed. Rep., p. 637. They were all decided against the carriers, who were mulcted in damages.

Id.

169. See LANDMARK BRIEFS, *supra* note 134, at 91-108 (noting Ferguson's opinion); see also *id.* at 96-97 (discussing *Logwood*).

170. See *id.* at 98.

uphold statutes that required segregation. He may not have read all the cases he cited, but he knew the name of the cases individually since he reconfigured the citations and therefore must have seen that at least some of them did not involve the issue of the constitutionality of a statute.¹⁷¹ He appeared to take the cases from *Hutchinson on Carriers*, where the text distinguished the Tennessee statute from one that required segregation and made clear that the other cases were common law obligations of carriers. Thus, it is likely that Justice Brown knew that at least some of the cases cited did not involve statutes. In short, he lied when he said that they held such statutes were constitutional.

V. WHY JUSTICE BROWN MISSTATED THE CASES

The decision in *Plessy* was the product of a host of social, political, economic and sociological forces. But the determination to uphold segregation does not explain the misstatement of the cases in the string citation, because Justice Brown and the Court could have used the cases accurately to reach the same result. The cases held that segregation on common carriers was a reasonable policy when the races were afforded equivalent accommodations, and that regulation of carrier policy was within state police powers. Finally, they demonstrated that courts understood that a requirement of "equality" required substantial equivalence and not identity, and that laws that prohibit "discrimination" do not preclude separation of the races. The cases did not hold that the standard for equal protection under the United States Constitution is the same as the common law and statutory standard for equal treatment by common carriers. But that argument was easily made. The question was an open one. The Court could have simply asserted that the same standard applies, and pointed in its own prior decisions in *Hall* and *Louisville* as suggesting that segregation laws were permissible.

Justice Brown used the string citation to create the appearance that the decision in *Plessy* was not significant, that he was not doing anything new, and that it was not necessary to discuss why he concluded the Fourteenth Amendment only required equivalent and not identical treatment. He knew that his use of the cases would not be challenged because they were not critical to his decision. He also recognized that the conflation of common carrier law with the constitutional principle would be accepted because: 1) prior Supreme Court decisions had switched the key language

171. See TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* 51 (Stanford Univ. Press 2006) (noting that Brown employed Albert B. Hall as his clerk from January 1891 to 1896 and then Frederick E. Chaplin); see also *id.* at 54 (appointing clerks as "stenographic clerks" and presumably did typing and shorthand); *id.* at 54 (suggesting that clerks may have examined cases cited in briefs, as Edwin Rombauer did for Justice Harlan). But see *id.* (concluding that justices like Brown in this period used their assistants primarily as stenographers). See generally BROWN MEMOIRS, *supra* note 138 (omitting mention of his clerks in his memoirs).

of the Amendment from privileges and immunities to equality; 2) the equality component of carrier law was developed in light of the Fourteenth Amendment; and 3) the test of reasonableness under due process was the same term used as the starting point for carrier law and its equality component was readily conflated with equal protection. Further, common carriers had a unique public status under the common law and the common law restrictions on carriers tended to protect the rights of African-Americans more rigorously than did statutes. Additionally, interpreting equality to require identical rights would undermine anti-miscegenation laws that had already been accepted by the courts.

Undoubtedly, Justice Brown honestly believed that equality meant the same thing in the Equal Protection Clause of the Constitution as it did in the common law obligation of carriers; however, he should have known that the cited cases did not involve statutes. Justice Brown may have believed that the distinction between statute and carrier regulation had no real significance to the result in this case and that an elaborate discussion of the reasoning would only detract from the opinion. Certainly it would not have changed the result. But that should not prevent an examination today of the difference between constitutional principle and the rules applicable to restrain private actors.

A. *The Function of String Citations*

String citations have fallen somewhat out of favor today, in theory, if not in practice. They are often disparaged as an unnecessary display of learning that eats up trees with no benefit to society.¹⁷² They served a purpose during the nineteenth century when lawyers and judges had difficulty getting access to the cases. Treatises and digests did not give much indication of relative precedential value to help the attorney select the most important sources and lawyers then often listed the cases in their briefs straight from the treatise. This often became a standard element of

172. See Thomas M. Lockney, *Tribute: Justice Beryl Levine: Taking Her Title Seriously in North Dakota Criminal Cases*, 72 N.D. L. REV. 967, 976 n.61 (1996) ("[I]n the interest of saving trees, the STRING CITATION is omitted."); see also RUGGIERO ALDISERT, *OPINION WRITING* 227 (1990) ("You should avoid string citations."); WILLIAM REYNOLDS, *JUDICIAL PROCESS* 102-03 (3d ed. 2002). Reynolds writes:

One vice in the use of authority that besets both bench and bar is the citation to a 'string' of authority, none of which is discussed by the author. Such usage fosters a belief that the author has not analyzed the authority referred to, but, instead, has merely taken a group of citations from a convenient reference.

Id.; Howard C. Westwood, *Brief Writing*, 21 A.B.A. L.J. 121, 121-22 (1935) ("The use of authority presents a vexing problem. The chief difficulty is that it has not yet been sufficiently impressed upon the bar that law is not found but is made by the judges. . . . [T]he string citation should be sparingly used."); Irving Younger, *Citing Cases for Maximum Impact*, A.B.A. J. Oct. 1, 1986, at 110 (writing "hideous on the page and useless to the judge reading it").

the decisions as well.¹⁷³ We no longer need such a finding aid. Nevertheless, the string citation still serves a variety of purposes.¹⁷⁴

In addition to displaying the writer's research, the string citation appropriately marshals cases to demonstrate that multiple courts have decided a point in the same way or that a point has been well settled for a long time in a particular jurisdiction. This can be used to offset claims that the law is different (the battle of string citations).¹⁷⁵ It may also be used to strengthen arguments that change should not be made. The depth and firmness of current law affects the degree to which people will have relied upon the current principle and the degree to which alteration will upset expectations and respect for the stability of the law.¹⁷⁶

One scholar notes, "String citations reflect the justices' belief that settled law decides the problem, despite the dissent's contrary authority."¹⁷⁷ It is a mark of the formal style,¹⁷⁸ and was particularly useful when judges and jurists argued that the judge found the law and did not make it. They show that the judge is following the common wisdom and not acting out of his or her own subjective views. In that way, the string cite avoids the onus of responsibility for the decision, indicates that the decision is not particularly significant, avoids the need to state other reasons and discourages counterarguments.¹⁷⁹

1. *Display of Learning*

Briefs, opinions and even law review articles may resort to string citation to demonstrate their scholarship, but that is not a sufficient reason for their use.¹⁸⁰ Where the type of writing attempts to be comprehensive,

173. See Patti Ogden, *Mastering the Lawless Science of Our Law: A Story of Legal Citation Indexes*, 85 LAW LIBR. J. 1, 16-17 (1993).

174. See K.K. DuVivier, *String Citations*—Part I, 29 COLO. LAW. NO. 7, 83-84 (July 2000) ("String citations are appropriate when you are trying to give readers comprehensive coverage of an issue. They also are helpful to show that a particular rule is widely accepted."); see also K.K. DuVivier, *String Citations*—Part II, 29 COLO. LAW. NO. 9, 67 (Sept. 2000).

175. See Theodore Blumoff, *The Third Best Choice: An Essay on Law and History*, 41 HASTINGS L.J. 537, 561 (1990); see also *Smith v. Wade*, 461 U.S. 30, 93 (1983) (O'Connor, J., concurring) ("The battle of the string citations can have no winner."); ALDISERT, *supra* note 172, at 227-28 (1990).

176. See G. Fred Metos, *Appellate Advocacy: Practical and Ethical Considerations in Arguing Case Law*, 23 CHAMPION 45 (1999).

177. Blumoff, *supra* note 175, 561 n.109.

178. See REYNOLDS, *supra* note 172, at 69; see also KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 38 (1960).

179. See Joseph Custer, *Citation Practices of the Kansas Supreme Court and Kansas Court of Appeals*, 8 KAN. J.L. & PUB. POL'Y 126, 128 (1999) (arguing that use of string citations to overwhelm counterarguments is not likely to succeed); see also *id.* (explaining "aesthetic counting"—"The idea that if enough cases are tossed at the reader he or she will simply capitulate under the sheer burden of authority.").

180. See Andrew Baida, *Developments and Practice Notes: Writing a Better Brief: The Civil Appeals Style Manual of the Office of the Maryland Attorney General*, 3 J. APP. PRAC.

they may be used more readily,¹⁸¹ but opinions do not normally attempt to go beyond the case at hand. Justice Brown did have pretensions to scholarship—producing a book of cases on Admiralty and teaching at Georgetown Law School. Nevertheless, his use of the string citation was more likely a product of beliefs about appropriate judicial decision-making than an attempt at erudition.

2. *Evoking Values of Stability and Predictability in the Law (Stare Decisis)*

Justice Brown had a higher rate of using citations than most of the other justices of the Fuller Court.¹⁸² Precedent itself may justify a decision, and Justice Brown often wrote opinions that were based on precedent. No one pretended that the issue in *Plessy* had been previously decided by the Supreme Court, but there are good reasons to follow the decisions of other courts when those decisions are consistent, even where they are in different or inferior jurisdictions.

Every opinion could theoretically engage in an elaborate discussion to demonstrate that its result is correct without reference to other decisions—but why reinvent the wheel? Where other judges have considered an issue and reached a reasoned conclusion, a later judge may appropriately cite the prior decisions as the basis for her subsequent conclusion to follow them. Rather than increasing the length of the opinion, the string citation may condense it by indicating that the reasons for decision may be readily found in the prior cases.¹⁸³

Further, the existence of widespread agreement on the appropriate resolution of an issue is itself evidence of the correctness of the resolution. The more people that come to the same conclusion, the more likely it is that the reasoning was persuasive. The judge who disagrees is likely to face accusations of imposing his or her own subjective values rather than engaging in an objective weighing of the arguments. In effect, the decisions create a burden on both judge and advocate to justify a different conclusion with even greater persuasiveness than would be necessary if there were no other decisions.

& PROCESS 685, 725 (2001); see also Bruce M. Selya, *In Search of Less*, 74 TEX. L. REV. 1277, 1279 (1996).

181. See also DuVivier, *String Citations—Part I*, *supra* note 174, at 83 (“Because law review articles attempt to be comprehensive in this way, string citations are the rule, rather than the exception, in the law review context.”).

182. See Walter Pratt, *Rhetorical Styles on the Fuller Court*, 24 AM. J. LEGAL HIST. 189, 191-92, 197 (1980). “Brown’s reliance upon historical scholarship links him to Holmes and Gray. All three felt that precedent provided sufficient justification for a decision; all three reflected their respect for state government by citing a large number of state cases in their opinions.” *Id.* at 201.

183. One reason why Constitutional Law treatises and texts so often begin with the Marshall Court decisions is that those opinions give rationales for the powers of different institutions of government, and later decisions simply cite to the earlier case rather than engaging in a new examination of the issues. Even when there is a new examination, it is likely to proceed from assumptions of the prior case.

Widespread agreement on a principle evidenced by decisions of various courts creates an expectation in those subject to the law that other courts will reach the same decision. Individuals are therefore likely to base their behavior on that expectation. This in turn creates a further reason for courts to follow the decisions of other courts.

Justice Brown used the string citation of transport cases to create a presumption in favor of the separate but equal principle. He stated that other courts had reached the same decision, so a departure from that principle would require unusual justification. Strategically, the string citation invoked the values of stability and predictability in support of the opinion.

The string citation indicated that the result was consistent with prior law and therefore should not occasion any particular notice. Indeed, that happened in *Plessy*, and as one scholar notes, "The *Plessy v. Ferguson* decision caused scarcely a ripple when it was announced on May 18, 1896."¹⁸⁴ It was the use of *Plessy* as precedent in later decisions that gave it prominence.

3. *Objectify Decision as Found Law*

In the eighteenth century, Sir William Blackstone said that the law existed from the history and customs of the people and the judge merely found it. He described judges as "the oracles of the law."¹⁸⁵ They could, of course, get it wrong, but it was an objective reality. In this view, the decisions of multiple judges in multiple jurisdictions were persuasive evidence that the law had been "found" correctly.

In 1890 the declaratory view of the law was still a powerful force.¹⁸⁶ The Judge was to be divorced from politics, and legal reasoning was its own unique form of reasoning. Indeed, it remains a powerful notion today that judges must derive their opinions and values from neutral objective sources and not from their own subjective views. The ideal of objectivity, however much derided as impossible, played a large role in the way in which judges wrote their opinions in the nineteenth century. In this respect, Justice Brown's use of the string citation deliberately played to this line of thought.

By attributing the legal principle to other judges and other courts, the Supreme Court Justice can claim that he is merely declaring what the law

184. See HARVEY FIRESIDE, *SEPARATE AND UNEQUAL: HOMER PLESSY AND THE SUPREME COURT DECISION THAT LEGALIZED RACISM* 222 (2004). There were a number of articles about the *Plessy* decision, particularly in the black community, but the *N.Y. Times* relegated the story to page 3 of its second section, and critical objections echoed Harlan's dissent rather than claiming any departure from precedent. *Id.* at 222-29.

185. See generally WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (1765-1769) 69 (1862).

186. See JAMES C. CARTER, *THE IDEAL AND THE ACTUAL IN THE LAW* 10 (Dando 1890) ("That the judge cannot make law is accepted from the start.").

is. The extent to which that law reflects the customs and mores of the people of the United States supports the correctness of the determination.¹⁸⁷ The judge is responsible for finding the law, but the string citation is strong evidence that he has discovered it correctly. One virtue to the author of the opinion is that the law takes on an impersonal face—it is not the subjective view of Henry Billings Brown that segregation is natural and appropriate, but he has discovered that it is the custom and principle of the society in which he lives.

B. *Challenge to the Accuracy of the String Citation Unlikely*

None of the benefits of string citation can be attained if the reader understands that the cases are misstated. Justice Brown could not avoid the responsibility for his decision and invoke the values of stability and predictability if his string citation was challenged and the challenger demonstrated that the cases do not support what he said. Therefore, if he expected the citation would be carefully scrutinized, he might not have put it in. Nevertheless, he had reason to believe that his string citation would not be questioned. First, similar statements in the A&E Encyclopedia aroused no criticism, and a similar use of precedent in the Louisiana Court had evoked no response. Second, demonstration that any case was incorrectly cited would not significantly advance the case against segregation. The heart of the argument was not precedent, so it was not worth the effort to attempt to refute what appeared to be a side show. Finally, there were a variety of reasons for conflating the common carrier cases with the command of the constitution and those reasons contributed to the confidence of Justice Brown that the string citation would pass without contradiction.

1. *Prior Misstatements Unchallenged*

The proposition that authority supported the constitutionality of state carrier segregation laws runs through the case. Counsel for Ferguson cited the A&E Encyclopedia to this effect in his brief to the Supreme Court.¹⁸⁸ Justice Fenner's opinion for the Louisiana Supreme Court indicated that authority supported the proposition, concluding after citing cases that:

They all accord in the general principle that in such matters equality and not identity or community of accommodations is the extreme test of conformity to the requirements of the XIV amendment.

. . . .

187. See Kunal M. Parker, *Context in History and Law: A Study of the Late Nineteenth-Century American Jurisprudence of Custom*, 24 LAW AND HIST. REV. 473 (2006) (noting that late nineteenth century saw development as well as seeds of opposition to "jurisprudence of custom").

188. See LANDMARK BRIEFS, *supra* note 134, at 116-17.

. . . . The cogency of the reasons on which this principle is founded perhaps accounts for the singular fact that notwithstanding the general prevalence throughout the country of such statutes and regulations and the frequency of decisions maintaining them no one has yet undertaken to submit the question to the final arbitrament of the Supreme Court of the United States.¹⁸⁹

Nevertheless, none of the briefs on behalf of Plessy challenged this claim. S.F. Phillips and F.D. McKenny filed a short brief as attorneys on behalf of Homer Plessy. They argued that his right as a citizen of the United States to travel was a privilege that was abridged by separation of the races and that separation was an injury to that right regardless of which race received the better accommodations or even if the accommodations were the same. This brief did not mention any cases that the Court used in its string cite.

James Walker and Albion Tourgee also filed a brief "of counsel" for Plessy that gave a detailed statement of the case. Tourgee argued that *Strauder v. West Virginia*¹⁹⁰ demonstrated that discrimination by the state was forbidden. His strongest argument was that the Louisiana law "comes squarely within the exception made in the Civil Rights Cases; it is a statute expressly ordained by State legislation and carried into effect by State agencies and tribunals."¹⁹¹ Tourgee admitted that *Louisville*¹⁹² held that the state could compel railroads to provide separate cars, but noted that the case did not decide whether individuals could be compelled to use the separate coaches. Walker focused on the problems of defining a person as white.

However, in all the arguments by Plessy's counsel before the Supreme Court, not one reference is made to any of the string cite cases. Walker had shown in his brief to the Louisiana State Supreme Court that he recognized that the cases mentioned in Ferguson's opinion did not involve state laws, but he focused the argument to the United States Supreme Court on principle rather than precedent. Thus, the Supreme Court did not have any brief in *Plessy* to point out the distinction between carrier common law obligations and the issue before them on the constitutionality of state law.

The plaintiff lawyers' failure to challenge the claim of precedent when they had the opportunity in their briefs suggested that they would not do so after the case was decided. Similarly, there were no challenges to the authority of the Encyclopedia.

189. *Id.* at 128.

190. 100 U.S. 303 (1880).

191. See LANDMARK BRIEFS, *supra* note 134, at 52.

192. *Louisville, N.O. & T. Ry. Co. v. Mississippi*, 133 U.S. 589, 597 (1890).

2. *Challenge Fails to Threaten the Decision*

More importantly, Justice Brown could see that no one had reason to challenge the assertion that authority upheld the constitutionality of carrier segregation laws. That one or two of the cases did not support the statement would hardly affect the strength of the case. But a challenge to all authority requires the reader to run through all twelve cases, many of which had not even been mentioned in the litigation. Readers had little reason to suspect that none of the cases actually supported the statement. Reading each case would appear to be a waste of time—because it was likely that they would confirm the common perception that they supported segregation laws as illustrated by the Encyclopedia and Judge Fenner's opinion.

Even if the reader were skeptical of the citation and did, like this article, run through each of the dozen cases, it would not change the outcome. The cases did not suggest that segregation was unconstitutional. Many of them expressed approval for separating the races. There seems to be no payoff in legal doctrine for a demonstration that the cases did not technically uphold the constitutionality of statutes. Even if someone knew that the citations were inaccurate, no audience would care enough about it to justify publication of the critique. Since there was little incentive to pursue the inquiry, Justice Brown could rest assured that his string citation would be left alone (at least until after his death, when *Plessy* would eventually come under direct attack).

C. *Belief the Principles Were the Same and the Distinction Too Fine*

Justice Brown may well have believed that objections to his string citation would be mere quibbles. He could find support in briefs, treatises and in the opinion below for the proposition that the common law principles were the same as the Fourteenth Amendment. Morse's brief said the reasoning in the common law cases supported the conclusion that the statute was proper.¹⁹³ The A&E Encyclopedia footnote to the statement that regulation of civil rights was a proper subject for the state's police power asserted "the same principle has been upheld" in four of the cases mentioned in the string cite.¹⁹⁴ Judge Fenner's opinion similarly asserted that the principles were the same. The text mentioned "regulations made by carriers" and referenced decisions to the effect that regulations enforcing segregation "do not. . . contravene the Fourteenth Amendment."¹⁹⁵ Fenner cited the same four cases for "the general principle that. . . equality

193. See LANDMARK BRIEFS, *supra* note 134, at 248.

194. See A&E ENCYC. L., *supra* note 152, at 754 n.2, 755. For a discussion of the A&E ENCYC. L.'s mention of cases in the string citation, see *supra* notes 156-158 and accompanying text.

195. *Ex parte Homer A. Plessy*, 11 So. 948, 950 (1892).

and not identity or community of accommodations is the extreme test of conformity to the requirements of the XIV Amendment."¹⁹⁶

There were a variety of reasons that so many viewed the common law principle as a constitutional one. The critical language used by the courts for applying the Fourteenth Amendment and the common law principle was the same. The equality component of the common law rule was developed in light of the Fourteenth Amendment. The carrier itself had a unique public status, and the equality principle was viewed as particularly stringent in the case law. Finally, the constitutional principle that the courts used in anti-miscegenation law cases was consistent with the carrier cases.

1. *The Shift from Privileges and Immunities to Equal Protection*

Both the common law and the language of the Constitution required the decision-maker to whom the rules applied to provide equality. The Fourteenth Amendment prohibited the state from denying the "equal" protection of the law, while the common law principle insisted that carriers provide "equal" accommodation. The use of the same word in both contexts—"equal"—led to the assumption that it meant the same thing.

The argument that all persons were entitled to identical rights under the Fourteenth Amendment has strong roots in history, but judicial decisions shifting the focus of the Amendment from privileges and immunities to equal protection opened the way to confusion. African-American rights were to be secured largely through a Privileges and Immunities Clause that would guarantee them identical rights to those held by white citizens. The notion of identical rights was at the heart of the Civil Rights Act of 1866. Sameness, not equality, was the test. And that Act was the basis for adoption of the Fourteenth Amendment. But people can only have "identical" rights in the abstract. In the concrete situation, they must have different things. The shift from reliance on the Privileges and Immunities Clause of the Fourteenth Amendment in the *Slaughterhouse Cases* to the use of equal protection in *Strauder* led the Court to believe "equal" in the Constitution had the same sense as "equal" in the requirements of the common law. The Court in *Plessy* turned the abstract right to be treated identically with whites into the concrete right to have a particular seat that was substantially equal to that of whites.

2. *Fourteenth Amendment Derivation from the Civil Rights Act of 1866*
Emphasized Privileges and Immunities

The Congress that wrote the Fourteenth Amendment also enacted the Civil Rights Act of 1866. Section One of that Act provided:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared

196. *Id.*

to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.¹⁹⁷

The Fourteenth Amendment reflected the Act—opening with a declaration of citizenship for persons born in the United States and then prohibiting states from denying them certain rights. The Act insisted that all citizens shall have the *same* right as white citizens to contract, to court access, to possession and transfer of property, and to “full and equal benefit of all laws and proceedings for the security of person and property.” The idea that specific rights should also have added to them equal benefit for security of person and property seems to reflect the separate clauses of section one of the Amendment, which states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹⁹⁸

Congressmen proclaimed that the Amendment simply enacted the statute into the Constitution.¹⁹⁹ There is a very good argument that they understood the privileges and immunities of citizens to refer to the same privileges and immunities that were in Article IV of the Constitution, and that they included rights to contract and to own property.²⁰⁰ Article IV protected residents of other states from discrimination in state laws on property and contract, and Fourteenth Amendment citizenship could be interpreted to forbid the use of race to distinguish between individuals

197. 1866 Civil Rights Act, ch. 31, 14 Stat. 27-30 (1866) (codified as amended at 42 U.S.C. §§ 1981-1982 (2004)).

198. U.S. CONST. amend. XXIV, § 1.

199. See BOGEN, PRIVILEGES & IMMUNITIES, *supra* note 15, at 49 (2003); see also CONG. GLOBE, *supra* note 15, at 2498 (Congressman Broomall); CONG. GLOBE, *supra* note 15, at 2514 (Congressman Raymond).

200. See CONG. GLOBE, *supra* note 15, at 2539 (Farnsworth); see also CONG. GLOBE, *supra* note 15, at 2459 (Stevens); CONG. GLOBE, *supra* note 15, at 265 (Howard); CONG. GLOBE, *supra* note 15, at 2962 (Poland); CONG. GLOBE, *supra* note 15, at 3035 (Henderson).

with respect to the rights, "privileges, and immunities" they had under state law.²⁰¹

3. *Slaughterhouse Cases Nullifies Privileges and Immunities Arguments*

Plessy's attorneys, Tourgee and Walker, tried to argue that privileges and immunities were the natural rights of citizens and that Louisiana law violated these rights.²⁰² Nevertheless, this argument was blocked by the *Slaughterhouse Cases*.²⁰³ That case held that the privileges and immunities of citizens of the United States were distinct from the privileges and immunities of citizens of the states, and only the former were protected by the Fourteenth Amendment. Contract and property rights were the latter. Regulation of the contract of carriage was a matter for state law, and not a privilege of citizens of the United States.

The *Slaughterhouse Cases*²⁰⁴ ended the effective use of the Privileges and Immunities Clause to argue for equality.²⁰⁵ Nevertheless, it was obvious from both the history and the statements of the Court that the Amendment must have had some ability to prevent discrimination.²⁰⁶ With privileges and immunities sterilized, the court turned to the Equal Protection Clause.

4. *Equality Discussions Found in Common Carrier Cases*

The Equal Protection Clause looks like a variant of the requirement in the Civil Rights Act of 1866 that all citizens have "full and equal benefit

201. See John Harrison, *Reconstructing the Privileges and Immunities Clause*, 101 YALE L.J. 1385 (1992); see also generally WILLIAM NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988).

202. See generally *Brief of Tourgee*, in LANDMARK BRIEFS, *supra* note 134.

203. 83 U.S. 36, 57 (1873).

204. *Id.*

205. Phillips and McKenney argued that segregation abridged a privilege or immunity of United States citizenship, namely, the right to travel. They argued that travel, unlike marriage or education, was a privilege of federal rather than state citizenship, citing *Grandall v. Nevada*, 73 U.S. 83 (1868). They pointed to *R.R. Co. v. Brown*, 84 U.S. 445 (1873), to argue that separation of the races inflicted an injury, so that they reasoned that segregation constituted a burden on travel forbidden by the Fourteenth Amendment.

The Court had already struck down the Civil Rights Act of 1875, 18 U.S. Stat. 335, §§ 1, 2 (1875), which prohibited discrimination in public conveyances, as beyond the power of Congress. See generally *Civil Rights Act Cases*, 109 U.S. 3 (1883). The Court held open the possibility that the Act would be constitutional as applied to interstate public conveyances, but that implied the Act would not be constitutional as applied to intrastate travel. If the federal government lacked power to regulate intrastate travel, the court would be unlikely to hold that state regulation of it violated a federal right. The *Plessy* Court's insistence that segregation was not an injury except in the mind of the plaintiff was also a partial answer to the privileges and immunities argument. See *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896). Travel was regulated, but no burden was put upon it that would prevent anyone from traveling. A tax could prevent someone lacking money from reaching federal offices—a different seat in the same conveyance would not.

206. See *Strauder v. West Virginia*, 100 U.S. 303, 312 (1880).

of all laws and proceedings for security of person and property."²⁰⁷ On its face, "equal protection" appears to simply guarantee that the tort and criminal law protections against assault and robbery that keep the person and property of white citizens secure will apply equally to non-whites. Laws that enforce agreements or distribute goods or services—i.e. contract rights and rights to acquire or sell real or personal property—look more like privileges than protections of the law. The Court needed to expand the Equal Protection Clause to deal with the kind of discrimination that the framers intended the Fourteenth Amendment to stop.

In *Strauder v. West Virginia*,²⁰⁸ the Court held that exclusion of blacks from the grand jury violated the Equal Protection Clause. Subsequent history has shown that a broad reading of equal protection may deal with all the problems that the framers intended.²⁰⁹ The problem in 1896, however, was that the use of the Equal Protection Clause shifted attention from the requirements of "same rights" to that of "equality." Justice Strong's opinion in *Strauder* used the Equal Protection Clause to require identity in rights:

What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?²¹⁰

Strauder showed that a court could use the "equal protection clause" to require identical rights, but it involved a total exclusion and thus was not a holding on whether separate but equal accommodations satisfied equality. That issue was not confronted until *Plessy*.

Plessy's lawyers paid scant attention to the Equal Protection Clause of the Fourteenth Amendment in their arguments. Tourgee and Walker assigned five errors—four relating to interpretations by the court below and one rooted in the unconstitutionality of the statute. They offered twelve reasons for the latter. The first ground was that the statute imposed a badge of servitude in violation of the Thirteenth Amendment and that discrimination abridged the rights privileges and immunities of citizens on account of race and color. The fourth ground argued that the statute does not extend equal protection of laws and violated due process, but the equal protection argument seemed tied to the exemption in the statute

207. 1866 Civil Rights Act, 14 Stat. 27-30, Apr. 10, 1866 A.D. Chap. XXXI.

208. 100 U.S. 303 (1880).

209. See David S. Bogen, *Slaughter-House Five: Views of the Case*, 55 HASTINGS L.J. 333, 391 (2003).

210. *Strauder*, 100 U.S. at 307.

for nurses attending to children of the other race. The rest of the arguments stressed due process contentions.²¹¹

The Supreme Court had little prior experience with "equality" beyond *Strauder*. The common carrier cases had insisted that "equality is not identity." Without an alternative articulation of equality, the Court was tempted to use the common law definition for the constitutional principle.

5. *The Fourteenth Amendment's Effect on the Common Law*

The common carrier cases began with a test of reasonableness. Before the adoption of the Fourteenth Amendment, some courts considered racially discriminatory laws to be reasonable even though they excluded African-Americans from sheltered areas of the carrier.²¹² When the Fourteenth Amendment was adopted, however, the various courts concluded that it was unreasonable to use race to deny persons substantially equal accommodations.²¹³ The Amendment did not apply to carriers directly because it only limited the actions of the state, but it destroyed the foundations for discrimination. If African-Americans were citizens, they were entitled to rights. If the law was to treat them equally, it suggested a general understanding that unequal treatment was inappropriate. Sometimes courts were explicit in declaring that prior reasoning had been overturned by the Amendment.²¹⁴ Even if the judge did not make direct

211. The due process ground focused on the improper discretion given to the conductor to determine race and the possibility of lacking a remedy for incorrect determinations. This was the basis for arguments 2, 3 and 8-12.

2) statute doesn't enforce substantial equality; 3) statute allows octoroons to be classed as non white; . . . 8) statute deprives citizens of remedy for wrong; 9) improper delegation to conductor of definition of persons of color; 10) common carriers cannot be authorized to distinguish according to race; 11) race is question of law that officer of railroad cannot consider; and 12) state cannot authorize conductor to make determination of race without testimony.

See generally id. There was also a claim of violation of natural right in separating married couples who were of different races, and a generic argument that the statute was not in the interest of public order "5) statute is not in interest of public order but directed against citizens of colored race; . . . 7) the statute is a violation of the natural and absolute rights of citizens of the United States to society and protection of their wives and children." *See generally id.*

212. *See, e.g., Day v. Owen*, 5 Mich. 520, 527-28 (1858) (discussing reasonableness of rule).

213. *See W. McGuinn v. Forbes*, 37 F. 639, 641 (1889) (discussing equality in accommodations); *Houck v. S. Pac. Ry. Co.*, 38 F. 226, 229 (1886) (same); *Logwood v. Memphis & C. R.R. Co.*, 23 F. 318, 319 (1885) (same); *The Sue*, 22 F. 843, 846 (1885) (same); *Chicago & Nw. Ry. Co. v. Williams*, 55 Ill. 185, 189 (1870) (same); *Chester & Phila. R.R. Co. v. Miles*, 55 Pa. 209, 214 (1867) (same).

214. *See Thompson v. Balt. City Passenger Ry.*, 23 F. Cas. 1023 (D. Md. 1870); *Ferguson v. Gies*, 82 Mich. 358, 364 (1890) (discussing how Constitution gave African Americans full citizenship). Judge Giles' remarks are reported in *Baltimore City Passenger Railway: Who Shall Ride in the Cars? Test Case in United States Circuit Court*, BALT. AM. & COMMERCIAL ADVERTISER, Apr. 30, 1870, at 1.

reference to the Amendment, it was apparent that it had an effect. Carriers could not reasonably refuse to furnish first class accommodations to citizens who were willing to pay the first class fare.²¹⁵

The use of the Fourteenth Amendment in the carrier cases as evidence of what was "reasonable" explains the Louisiana Supreme Court's reference to decisions that "regulations enforcing the separation of the races in public conveyances. . . , so long at least as the facilities or accommodations provided are substantially equal, do not abridge any privilege or immunity of citizens or otherwise contravene the Fourteenth Amendment."²¹⁶ Of course the carrier's rules could not violate the constitutional prohibition against state behavior, but they might be contrary to the principle of equality contained in the Amendment. Because common law decisions based on that principle prohibited unequal treatment, permission for racial separation in those decisions suggested that those courts believed segregation by carriers was consistent with the principle of equality found in the Amendment.

6. *The Substantive Due Process Reasonableness Standard*

Another factor that led the Court to believe that the common law principle was the same as the constitutional command was the use of the idea of reasonableness in both situations. The litigation in *Plessy* involved the impact of the law on an individual, but the law also regulated the railroad. *Plessy* could contend that the law violated equal protection as to him, but the railroad was treated equally with other railroads. Thus, the application of the law to the railroad could more easily be challenged as an improper restriction of its interest in managing its own property. The Court began to talk after the Civil War about private businesses that were "affected with a public interest," or property devoted to a use in which the public had an interest.²¹⁷ Such businesses could be regulated, but the regulation must be reasonable or it would be a deprivation of property without due process.²¹⁸ That argument was made in *People v King*,²¹⁹ where the owners of the skating rink argued that an anti-discrimination law deprived them of their property without due process. The due process challenge did not compare the property to the rights of others, but simply used the reasonableness of the law as its basic criteria. The New York

215. *The Sue*, 22 F. at 848.

216. *Ex parte Homer A. Plessy*, 11 So. 948, 950 (1893).

217. *See Munn v. Illinois*, 94 U.S. 113, 127 (1877).

218. *See id.* at 134 (noting that common law right of property cannot be taken away without due process). *Chi., M. & St. P. Ry. Co. v. Minnesota*, 134 U.S. 418 (1890) (holding company deprived of ability to charge reasonable rates for use of property is deprived of property without due process); *cf. Mugler v. Kansas*, 123 U.S. 623 (1887) (states depriving person of property without due process of law constitutes grounds for federal jurisdiction).

219. *See People v. King*, 110 N.Y. 418, 424 (1888) (discussing limitations of state police power concerning deprivation of private property without due process).

courts upheld the law as a reasonable regulation of a business affected with a public interest because the rink was open to the public.

Since business regulations were usually challenged on the grounds of reasonableness, the common carrier decisions that held racial separation by the steamboat was reasonable appeared to resolve the question whether requiring carriers to separate the races would be reasonable. Further, since they also found reasonableness required equal accommodations as a result of the Fourteenth Amendment, they seemed to resolve questions of whether separate accommodations could be equal as well. If equality is an aspect of reasonableness, a reasonable regulation satisfies the requirements of equality. Thus, the standards of reasonableness and equality became virtually indistinguishable.²²⁰

When *Plessy*'s counsel argued that separate accommodations would lead to separation in everything, the Court replied that "every exercise of the police power must be reasonable."²²¹ Indeed, Justice Brown made reasonableness rather than equality the test for compliance with the Fourteenth Amendment:

So far, then as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature.²²²

The focus on reasonableness of regulation echoed both the common carrier doctrine and due process decisions of the Court. Common carrier cases developed a separate but equal doctrine out of a requirement that public conveyances act reasonably in making rules for their passengers.²²³ The Court virtually reversed the process in *Plessy*, making a "reasonableness" test out of a command of equality. In doing so, the Court may have been influenced by its due process decisions. In any event, the use of the same vocabulary led courts to perceive that the Constitution imposed the same limit as the common law.

7. *The Public Status of Carriers*

Carriers had unique obligations under the common law. They were not merely "affected with a public interest" but were viewed as public entities, although not governmental bodies. The common law rules that identified carriers as public entities could be overcome by statute, but that just

220. The perception that due process includes equality became embedded in law in *Bolling v. Sharpe*, 347 U.S. 497 (1954). *Id.* at 500 (holding Fifth Amendment Due Process Clause prohibited the federal government from segregating schools in District of Columbia).

221. *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896).

222. *Id.*

223. For a discussion of *Day v. Owen*, see *supra* notes 41-46 and accompanying text.

made the common law requirement of equality look like the limit to which the principle could be pushed.

a. The Obligation Demonstrates the Special Status of Carriers

The common law treated common carriers as exceptional. Justice Holmes protested against the rules of strict liability for common carriers in the book, *The Common Law*.²²⁴ He complained that there was no reason to impose such liability only on carriers, attributing the policy anomaly to the eighteenth century decision of Justice Holt. But the criticism simply highlighted the special legal status of carriers, and a strong sense of reverence for custom and for the common law in the late nineteenth century helped preserve its unique place in the law.

Over the centuries, since the beginning of the common carrier doctrine in England, the doctrine's focus shifted from protecting customers from harm to the public nature of the occupation.²²⁵ This helped lead to the historically incorrect assumption that the obligations of the common carrier existed because of a unique status as a "public" occupation.²²⁶ The "public" business was a step beyond merely "affected with a public interest;" even the defendant's attorneys in *King* assumed that regulation of carriers was appropriate for government.

Because the obligations of the common carrier stemmed from their status rather than contract or statute, they could be viewed as part of the background for evaluating actions of public entities. That could lead to confusion between the government and the "public" business. Limits on the latter were even more powerful because the common law commanded it even without legislation. To the extent that people envisioned the common law as arising from society, the principle itself seemed fundamental.²²⁷

b. Common Law Equality Obligations Stricter than Statutes

Most of the statutes and ordinances in cases cited in the *Plessy* briefs and opinions involved school segregation. Unlike carriers, school operations were more likely to be governed primarily by statute rather than the common law. Parents and students attacked school segregation in part because it forced them to go further from home. Courts responded that

224. See OLIVER WENDELL HOLMES, *THE COMMON LAW* 160-61 (M.Howe ed., Harvard Univ. Press 1963); see also Oliver Wendell Holmes, *Common Carriers and the Common Law*, 13 AM. U. L. REV. 609, 630 (1879) (discussing imposition of strict liability on common carriers).

225. See Bogen, *Innkeeper's Tale*, *supra* note 38, at 52-53, 91 (discussing development of theory of public accommodation).

226. See *id.* at 52 (citing Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies (Part I)*, 11 COLUM. L. REV. 514, 515-16 (1911)).

227. See generally MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* 1 (1977) (discussing conception of common law in early American society).

separation was consistent with equality, and that the greater distance that African-American children had to travel was merely an incident of having separate schools.²²⁸ Other than distance, plaintiffs did not focus on inequality in the schools, and the courts usually did not stress it.

The courts in carrier cases focused more on equality in facilities under the common law than under statutes, invalidating segregation where equal facilities were not provided.²²⁹ Statutes tempered this obligation by stressing separation. Indeed, the first Tennessee carrier statute simply removed the common law obligation.²³⁰ The later segregation statutes established the standard for the railroad's obligation to provide equal accommodations.²³¹ Under that standard, the court reversed the lower court's finding of inequality in *Wells*.²³² Thus, statutory equality requirements appeared to be weaker than the common law.

To the extent that counsel argued segregation statutes were constitutional, the cases upholding racial separation under a common law standard then seemed to be paradigms of the standard for equality. Indeed, counsel in *Plessy* suggested that the carrier's common law obligations were stricter than the constitutional limits on the state. In his brief to the Louisiana Supreme Court, District Attorney Adams asserted that state statutes could regulate local carriage with respect to separation of the races, adding: "even in the absence of any legislation on the subject the common carrier was at liberty to adopt in reference thereto such reasonable regulations as the common law allows."²³³ Alexander Porter Morse similarly intimated in his brief to the United States Supreme Court that the legal hurdles for segregation were higher for carriers under the common law than the constitutional hurdles for segregation statutes. He stated that courts held laws requiring segregation were justified. Then, he said: "[a]nd the weight of authority seems to support the doctrine that, to some extent at least and under some circumstances, such a separation is allowa-

228. See *Lehew v. Brummell*, 15 S.W. 765, 766 (1890) (finding further distance black children have to travel to school inconvenient, but not grounds for complaint); *Cory v. Carter*, 48 Ind. 337, 364 (1874) (finding even if trustees of school system failed to provide equal funds to educate African-American children, remedy is to compel them to do so rather than to integrate existing school); *State v. McCann*, 21 Ohio St. 198, 211 (1871) (maintaining segregated schools); see also *People v. Gallagher*, 93 N.Y. 438, 457 (1883) (holding segregated schools did not violate equal protection); *Bertonneau v. Dir.*, 3 Fed. Cas. 294, 296 (C.D. La. 1878) (holding state has right to manage schools and maintain segregation in manner that will promote the interest of all); *Ward v. Flood*, 48 Cal. 36, 57 (1874) (finding segregation permissible where separate schools maintained).

229. See, e.g., *The Sue*, 22 F. 843, 848 (1885) (finding racial segregation on common carrier cannot be upheld unless it can be proved that separation is free from any actual discrimination in comfort or appearance of inferiority).

230. See Acts of the State of Tenn., 1875, pp. 216-17.

231. See generally *WELLS*, *supra* note 89.

232. See *id.*

233. Brief of Lionel Adams for Respondent, at 27, *Ex parte Homer A. Plessy*, No. 11134 (La. Dec. 1892) (emphasis added).

ble at common law."²³⁴ Even Tourgee, arguing for Plessy in the Louisiana Supreme Court, saw the statute as an attempt to overcome the requirements of common law, which had led to victory for numbers of plaintiffs: "Act No. 111 of 1890 is an ineffectual attempt to protect the railroads from a similar misadventure."²³⁵

The reverence for custom and the common law in the late nineteenth century also contributed to the perception that the common law test for equality was appropriate for the Constitution. Although strong forces attacked classical legal thought, the Legal Realists had yet to make their appearance. Thus, there was popular support for a historical view of the law as based on the customs of the people and for custom as the basic glue for society.²³⁶ Since the common law standard appeared more protective than statutes, it was particularly likely to be viewed as a paradigm for equality. Thus, Justice Fenner's opinion for the Supreme Court of Louisiana insisted that cases like *Logwood* and *The Sue* accord in the general principle that equality and not identity of accommodations is the test of conformity to the requirements of the Fourteenth Amendment.

D. *Consequences of Equality as Identity: The Common Carrier Challenge to Identity Analysis in Miscegenation Cases*

Transportation segregation was not critical to the racial hierarchy of the late nineteenth century. A different decision in *Plessy* would have left private segregation intact. The threat came from the potential effect on interracial marriage. Identical rights and equivalent rights were competing visions of equality. Each vision seemed consistent with anti-miscegenation laws—as long as the right was characterized as the right to marry someone of one's own race. This narrow notion of a right, however, could not be applied in the transportation context. The inability to describe a right in racial terms undermined the argument that anti-miscegenation laws were constitutional. Thus, the Court needed to use equivalence rather than identity of rights in order to preserve its position on miscegenation.²³⁷ Since a majority was convinced that anti-miscegenation laws were constitutional, they understood the constitutional principle was the substantial equivalence understanding of the common law rule.

234. LANDMARK BRIEFS, *supra* note 134, at 148.

235. Brief of Relator for Writs of Prohibition and Certiorari to the Judge of Section A Criminal District Court for the Parish of Orleans, Albion W. Tourgee and Jas. C. Walker, at 22 (Nov. 30, 1892).

236. HOROWITZ, *supra* note 227, at 118-23 (discussing philosophy of James C. Carter in opposing codification movement).

237. See *Pace v. Alabama*, 106 U.S. 583, 585 (1883) (discussing how increased penalty for fornication if parties are of different races is constitutional because punishment for crime of interracial sex is same for both races).

1. *Right Defined as Marriage to Member of Prospective Spouse's Race*

Few people were willing to challenge the anti-miscegenation laws of the time.²³⁸ Opponents of the Civil Rights Act and the Fourteenth Amendment had raised the issue of miscegenation to scare proponents of antidiscrimination legislation,²³⁹ but proponents responded that there was no denial of equality—both the white and the black individual were forbidden to marry.²⁴⁰ In other words, the right at issue was characterized as a right to marry someone of the same race. By characterizing the right in racial terms—the right to attend school with persons of the same race, to marry someone of the same race, or to travel on public conveyances with persons of the same race—it was possible to argue that segregation laws provided the “same” rights as those afforded to white citizens.

The argument that segregation provided the same right had been effective for marriage, but it was weaker with respect to services. The “same” right results in integration when the politically dominant race is unwilling to be totally separated. Because whites were eager to employ black labor and buy property owned by blacks, or to sell real or personal property to blacks, the “same” right allowed blacks to contract across the races. Thus, the requirement of the Civil Rights Act of 1866 that all citizens have the same right to contract and own property as white citizens generally, effectively precluded racial lines in those areas. Only when the dominant political group desired separation did it make a difference whether equality meant identical rights or only equivalents.

2. *Transport in Same Circumstances as Other Members of Race Is Not Equal*

Common carriers responded to a push for segregation. Their regulation highlighted the difficulties of a racially defined right. When rights

238. See *Plessy v. Ferguson*, 163 U.S. 537, 545 (1896). Justice Brown noted in *Plessy* that laws forbidding racial intermarriage “have been universally recognized as within the police power of the State.” *Id.*

239. See CONG. GLOBE, *supra* note 15, at S. 505-06 (Johnson); CONG. GLOBE, *supra* note 15, at S. 598 (Davis); CONG. GLOBE, *supra* note 15, at H. 632 (Thorn-ton); CONG. GLOBE, *supra* note 15, at H. app. 134 (Rogers) (explaining 14th Amendment privileges and immunities); CONG. GLOBE, *supra* note 15, at H. 1121 (Rogers) (discussing Civil Rights Bill).

240. CONG. GLOBE, *supra* note 15, at S. 322, 420, 600 (Trumbull) (urging passage of Freedmen's Bureau Bill, Trumbull refers to prior statements when defending Civil Rights Bill); CONG. GLOBE, *supra* note 15, at S. 505 (Fessenden) (supporting passage of Civil Rights Bill); CONG. GLOBE, *supra* note 15, at H. 632 (Moulton) (same). President Johnson's Veto Message on the Civil Rights Act indicated that the bill would not preclude anti-miscegenation laws. See CONG. GLOBE, *supra* note 15, at S. 1680; see also *Pace*, 106 U.S. at 585 (finding statute mandating increased penalty for interracial sex unconstitutional). In upholding the statute punishing intermarriage and punishing interracial sexual activity more strongly than interracial acts, the Court said, “[w]hatever discrimination is made in the punishment prescribed in the two sections is directed against the offence designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.” *Id.*

are described racially, the "same" rights often produce very unequal concrete results that cannot satisfy a requirement of equality. The cases demanding equal accommodations on public conveyances made clear that separation of the races alone could not be considered to provide "equal" rights. Common carrier plaintiffs insisted on facilities equal in comfort to those afforded white passengers, not on abstract notions of sameness.²⁴¹

Courts understood that the "right" in common carrier litigation was a right to sit in the conveyance rather than a right to sit with someone of one's own race. Excluding African-Americans from sitting in the covered portion of a carrier was transparently unequal, even if all African-Americans sat outside and all others sat inside. Once the Court looked to the concrete nature of the right, it had to broaden the definition of the right to obtain equality; however, the "same" right to sit on public conveyances that white persons had would preclude the use of race in seating rules. Segregation could be justified only if equality did not require identity in rights.

With respect to miscegenation, the Court initially seemed to define equal rights as equal rights to sexual relations within the race (as defined by the court or the state),²⁴² but ultimately the Court recognized that the African-American did not have the same right as the white to marry a white person.²⁴³ The carrier cases suggested the difficulty of defining the right racially. Additionally, they provided a mechanism for continuing to uphold anti-miscegenation laws. Even if the rights were different, it could be argued that the restrictions on marriage for whites (cannot marry African-Americans) were substantially equal to those on African-Americans (cannot marry whites). In citing the dozen cases on public conveyances, the Court insisted that the Constitutional command was for "equality" rather than "sameness" of rights. In short, it hid the argument that "equal" had a very different understanding for purposes of the Fourteenth Amendment and common carrier law.

E. *The Difference in Principles*

Justice Brown saw no difference in principle between the common law obligations of carriers and the command of the Fourteenth Amendment. He probably felt that objections to his fusion would be mere technical quibbles. It would have diluted the strength of his appeal to existing norms to elaborate on the cases, but it would not have changed the outcome in *Plessy*.

241. African-American individuals objected to the use of race in any fashion, but legal cases were primarily fashioned on a separate but equal theory. See generally WELLS, *supra* note 89.

242. See *Pace*, 106 U.S. at 585 (upholding statute punishing interracial sexual relations).

243. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding freedom to marry person of another race cannot be infringed upon by states).

With hindsight, there are many objections that could be raised to using the common law principle as a constitutional norm. It does make a difference whether the issue is the limit on decisions made by a private carrier or a public entity. Appropriate reasoning for common carriers may not be appropriate for the government. Equality under the common law presents a different context than constitutional equality.

It may be reasonable for a carrier to separate the races to increase the number of customers who would like to use its services. The carrier's rational goal is to maximize its income. Nevertheless, maximizing the carrier's income is not an appropriate goal for government. Whether it is reasonable for the government to require the carrier to treat citizens differently, therefore, is a very different issue from the reasonableness of the carrier's decision.

Carriers have a traditional property right in their vehicles and control over them. Courts have long acknowledged that the carrier's right to decide where passengers must sit is subject to a reasonableness requirement. Satisfaction of the desires of its customers is a carrier's function, and it must do so to enhance its revenues. But customers do not care whether persons separated from them get equally comfortable seats. The fare charged by the carrier is sufficient to build and maintain first class facilities, so customers willing to pay that fare provide the same economic support regardless of race. Thus, the Courts found that it was unreasonable for a carrier under an obligation to take a passenger to provide inferior facilities to persons paying the same fare. This was true of white customers as well as black. This notion of equality views the question as one of identifying the physical item the customer paid for. The seller may select the particular object to deliver from among fungible goods, but the good must meet standards of equivalence. In the carrier case, neither the white nor the black passenger had a right to any specific seat, because the property rights of the carrier give it control of seating arrangements. In this context, an equal seat is one that is substantially similar to others of that class.

The government has a very different relationship with its citizens in making statutes than a carrier has to its customers. The government does not provide in these cases a concrete object like a seat. It provides through its laws a general abstract right. Two persons cannot have the same seat because only one person can sit down in it. Thus, the common law held that a carrier's obligation to provide equal seating is limited to substantial equality. Two people may have the same right to a seat, although which seat they get depends on other events—e.g. before the seat is allocated, both have the same right to a seat, but the particular seat may depend on whether they are the first to sit in it or whether they get a ticket naming that seat. All persons have the "same" right to contract, but enforcement of the right depends on whether the parties made a contract. Thus, equality in the common law context may be concrete and refer to substantial similarity of physical objects while equality in the constitutional

sense refers to whether a classification that distinguishes people is appropriate. The Court in *Plessy* never considered the argument, but we are gradually understanding why they were wrong.²⁴⁴

VI. CONCLUSION

This exploration of the string citation of carrier cases in *Plessy* shows how the Court confused common law standards with Constitutional principles. The function of the Fourteenth Amendment was to produce the same rights for African-Americans as for white citizens. At the same time, it did not aim to control the behavior of individuals or private organizations who might seek to separate the races. The rules that were developed to constrain private choices demonstrated a regard for all people, but did not insist that there be no separation. They influenced perceptions in the public arena, but the different context of the common law rules justified a different understanding for constitutional principle—a difference that the Court missed in *Plessy*.

The public-private distinction has been subject to a great deal of attack.²⁴⁵ Private centers of power may be as significant to the individual as public ones.²⁴⁶ Corporations and NGOs cross governmental lines and, for that reason, may be beyond effective control.²⁴⁷ On the other side, disputes ultimately have the possibility of governmental resolution and take place in the context of a society with rules largely framed by govern-

244. The Court started down the road focusing on classification by its decision in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (striking down separate but equal doctrine). The Court has been following it ever since in striking down distinctions based on gender and legitimacy. See, e.g., *Craig v. Boren*, 429 U.S. 190, 210 (1976) (holding gender based differential in state statute prohibiting sale of 3.2% beer to males under age of 21 and to females under age of 18 constituted denial of equal protection); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (holding denial to illegitimate children right to recover for wrongful death of mother constituted invidious discrimination).

245. See, e.g., HOROWITZ, *supra* note 227, at 204-08 (discussing how common carriers granted power to use notices to claim exemption from liability and how population was at mercy of carriers as result); Henry J. Friendly, *The Public/Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982) (discussing public function doctrine). See generally Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. REV. 503 (1983) (discussing issue of infringement of basic rights by private actors); Louis Jaffe, *Law-Making by Private Groups*, 51 HARV. L. REV. 201 (1937) (discussing extent to which grant of powers to specific groups, binding on whole group and effective against public, is within traditions of our legal system).

246. See generally Adolf Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952) (discussing impact of grant of specific legal protections to individuals in dealings with private units with great economic power).

247. The ability to shift business and activities from one country to another creates difficulties for nation state regulation. See generally GILES PACQUET, *THE MULTINATIONAL FIRM AND THE NATION STATE* (1972); KARL SAUVANT AND FARID LAVIPOUR, *CONTROLLING MULTINATIONAL ENTERPRISES: PROBLEMS, STRATEGIES, COUNTERSTRATEGIES* (1976).

ment.²⁴⁸ In that sense, all private actions not prohibited by law may be thought of as sanctioned by law.

Nevertheless, the history of the *Plessy* litigation suggests that there is a useful function in keeping the spheres separate. What is appropriate behavior to promote the freedom of association of one group may be entirely inappropriate as a command of government. We may decide that standards for public life are appropriate for private life as well in specific cases, but the application should be thoughtful and not automatic.

A related issue is being played out in our state and federal courts. Gay and lesbian couples seek the same marital rights as heterosexual couples. The Constitution does not and should not apply to the moral and ethical determinations of individuals and organizations that disapprove of such unions. Whether a religion chooses to recognize such unions or condemn them is an appropriate judgment for that body. If a religion prohibits homosexual unions, that is a matter of church policy and religious ritual.

Marriage is also a legal status that stands apart from the church. It has a variety of legal consequences with respect to tax laws, default rules of inheritance, powers of substituted judgment, and often derivative benefits in health and retirement plans. It has consequences for rights with respect to children. The current challenge is whether these consequences can constitutionally be restricted to opposite sex couples.

The first line of argument has been that all people have the same right—to marry a person of the opposite sex. Our history with racial classifications has demonstrated the inadequacy of this response—if a man can marry a woman, he has a right denied to women. The key argument must lie with the classification itself. Can the classification be justified in light of the purposes and function of the Fourteenth Amendment? Social opprobrium and the distaste for such relationships suffice for private expressions of condemnation, but the racial cases suggest it is not sufficient for purposes of governmental distinctions. We need to be able to distinguish between the standards applicable to private entities and those that apply to our public selves.

The misuse of the string citation in *Plessy* does not demonstrate that the gender classification in marriage is groundless or improper, but it cautions that participants in the debate and those seeking solutions should recognize that the appropriate standards for personal consideration of propriety are very different than the standards to which a government should be held. We should not use broad acceptance of a customary way of doing things as a substitute for directly confronting the principles that should apply to government commands.

248. See Frank I. Michelman, *Foreward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 17 (1969) (discussing minimum protection theory in context of deprivation of rights).